Supreme Court, U.S.
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No. _____

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1995

SICOR LIMITED, ALCO CHEMICALS LTD.,

Petitioner,

v.

CETUS CORPORATION;
CETUS GENERIC CORPORATION;
BEN VENUE LABORATORIES, INC.;
BEN VENUE GENERIC CORPORATION;
and CETUS-BEN VENUE THERAPEUTICS,

Respondents.

On Petition for Writ of Certiorari
to the United States Court of Appeals
for the Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

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June 30, 1995

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QUESTIONS PRESENTED

The patent on doxorubicin, a leading anticancer drug, expired in 1988. Despite high entry barriers, a generic manufacturer captured 30% of the market previously monopolized by the patentee and its vertically-integrated distributor. The former monopolist and distributor then entered into an exclusive contract to supply the generic manufacturer's distributor, thereby regaining an 89% share of the market and eliminating their competitor from the market.

1. In a concentrated market characterized by high entry barriers, can the restoration of a monopoly by capturing a rival manufacturer's only viable distributor be considered "pro-competitive," so as to require summary judgment for the monopolist on the excluded rival's claim of antitrust law violations?

2. Is "making money" a valid business justification which eliminates antitrust liability for a vertically integrated manufacturer/distributor to enter into an exclusive supply contract with its only significant competitor's distributor and thereby arrest price competition by eliminating the competitor from the market?

3. Does the cessation of price competition at the wholesale level constitute an injury to competition?

LIST OF PARTIES

The parties to the proceeding before the United States Court of Appeals for the Ninth Circuit were Sicor Limited and Alco Chemicals Ltd., as Plaintiffs-Appellants; and Cetus Corporation, Cetus Generic Corporation, Ben Venue Laboratories, Inc., Ben Venue Generic Corporation, and Cetus-Ben Venue Therapeutics, as Defendants-Appellees.

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Respondents.

On Petition for Writ of Certiorari
to the United States Court of Appeals
for the Ninth Circuit

Petitioners, Sicor Limited and Alco Chemicals Ltd. ("Sicor"), hereby petition the Court for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Ninth Circuit (App., infra, 1a-31a) is reported at 51 F.3d 848 (1995). The opinion of the United States District Court for the Northern District of California in this case (App. 32a-55a) is unreported.

JURISDICTION

The judgment of the United States Court of Appeals for the Ninth Circuit which is sought to be reviewed was entered on April 3, 1995. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. §1254(1).

STATUTES INVOLVED

Section 1 of the Sherman Act of 1890, as amended, 15 U.S.C. §1, provides, in pertinent part:

> Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal. Every person who shall make any contract or engage in any combination or conspiracy hereby declared to be illegal shall be deemed guilty of a felony . . . .

Section 2 of the Sherman Act of 1890, as amended, 15 U.S.C. §2, provides, in pertinent part:

> Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a felony . . . .

STATEMENT OF THE CASE

A. Statement of the Facts

Doxorubicin is a leading anti-tumor compound widely prescribed for the treatment of certain cancers. During the relevant period, the U.S. doxorubicin market was highly concentrated with only four manufacturers in the world possessing the requisite approval by the U.S. Food and Drug Administration to produce bulk doxorubicin for sale in the United States.[1] Because doxorubicin is a highly toxic, strictly regulated pharmaceutical that can be processed for distribution by only a limited number of technologically capable U.S. distributors, the number of entrants and potential entrants in the U.S. doxorubicin market was significantly limited. (App. 63a-64a).

1. Sicor's Entrance Into the Monopoly Market

Until 1988, Farmitalia and its affiliated U.S. distributor, Erbamont, Inc. ("Erbamont"), had a virtual monopoly on the sale of doxorubicin by ownership of a patent on the product.[2] In 1989, the plaintiff Sicor, a generic manufacturer of bulk doxorubicin located in Italy and approved by the United States Food and Drug Administration,

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[1/]The four FDA qualified doxorubicin manufacturers were comprised of two Italian companies -- Sicor and Farmitalia Carlo Erba, S.r.l. ("Farmitalia") -- and two Japanese pharmaceutical manufacturers -- Meiji and Mercian. In addition, there was a doxorubicin manufacturer in China, one in Russia and one in Hungary which did not have, and were believed not qualified to receive, FDA approval.

[2/]Farmitalia and Erbamont are sister companies, both owned by Erbamont N.V. Farmitalia and Erbamont marketed doxorubicin in the United States under the brand name Adriamycin, which was "finished" by their wholly-owned affiliate, Adria.

sought to enter the U.S. doxorubicin market by competing on the basis of price.

Sicor, which had no independent facilities of its own in the United States, sought an American company qualified to "finish" and distribute the bulk doxorubicin to be supplied by Sicor. Although doxorubicin is a potent weapon against cancer, it is highly toxic and the encapsulation or "finishing" of bulk doxorubicin into dosage form must be done in a rigorously controlled environment. Sicor introduced evidence that, even within the American pharmaceutical industry, it could find only three companies feasibly able to perform the finishing function in compliance with FDA standards, and only one of those companies -- Cetus-Ben Venue Therapeutics ("CBVT") -- was willing and able to finish bulk doxorubicin in a manner that was commercially viable.[3] (App. 64a-65a).

Sicor executed a Supply and Distribution Agreement with CBVT which permitted the two companies to aggressively market doxorubicin in the United States, first with the powder form of the drug in mid-May 1989, and then with the solution form in mid-June 1989. The arrangement was successful in that, by the end of 1990, the price of doxorubicin to cancer patients had declined by approximately 40% and Sicor and its finisher/distributor, CBVT, had obtained a 30% share of the doxorubicin market previously monopolized by Farmitalia and its distributor and sister company, Erbamont. (App. 66a).

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[3]/CBVT is a joint venture partnership of respondents Cetus Generic Corporation and Ben Venue Generic Corporation. The other two respondents, Cetus Corporation and Ben Venue Laboratories, Inc., are the respective parent corporations of the two CBVT general partners.

2. Monopolist Manufacturer Acts to Exclude Its Only Significant Competitor

Farmitalia responded to this post-patent monopoly competition by taking a number of actions to prevent Sicor from importing bulk doxorubicin into the United States. These included a complaint to the International Trade Commission seeking to bar the importation of doxorubicin (the complaint was dismissed), and the filing of several patent infringement suits (none successful). (App. 68a).

Concurrently with its domestic attacks on Sicor's marketing of doxorubicin, Farmitalia initiated proceedings in Italy in an attempt to enjoin further production of bulk doxorubicin at Sicor's Italian facility. This contested proceeding in Italy, which is still unresolved, resulted in Farmitalia obtaining a temporary injunction closing down Sicor's manufacturing facility. As a result, Sicor arranged to supply its finisher/distributor, CBVT, with bulk doxorubicin from another FDA approved facility. (App. 66a-67a).

In one of its patent infringement actions, Farmitalia challenged the sale of doxorubicin in solution form by CBVT. Doctors had begun to express a preference for the administration of doxorubicin in solution form to treat certain types of cancer. Sicor, together with its U.S. finisher/distributor, CBVT, were the only other suppliers/distributors of solution form doxorubicin in the United States and, thus, Farmitalia's sole competition for this significant section of the U.S. doxorubicin market.[4]

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[4]/In anticipation of Farmitalia's threatened solution patent action, Sicor and CBVT obtained the opinion of respected U.S. patent counsel that Farmitalia's patent on solution form doxorubicin was invalid. Accordingly, Sicor shared in funding an action brought by CBVT seeking, *inter alia*, a declaratory judgment of invalidity of the solution form patent. That meritorious challenge to the patent was terminated by CBVT when it entered into the contract to displace Sicor

3. The Collusive Supply Agreement to Restore the Monopoly

Concealing their negotiations from Sicor, CBVT and Farmitalia negotiated an agreement by which CBVT would abandon its existing agreement to purchase bulk doxorubicin from Sicor. CBVT pledged to acquire all future supply of doxorubicin (including powder form) exclusively from Farmitalia. Unlike the Sicor-CBVT Supply and Distribution Agreement, which contained incentives for competitive pricing by CBVT, the pricing formula for the sale of Farmitalia bulk doxorubicin to CBVT significantly increased the wholesale price and severely limited the ability of CBVT to engage in price competition with Farmitalia. CBVT abandoned its competitive distribution agreement with Sicor in order to distribute Farmitalia doxorubicin exclusively. (App. 67a).

The CBVT-Farmitalia secretive and exclusive agreement had an immediate and anti-competitive effect on the already concentrated doxorubicin market. Sicor, which was Farmitalia's only significant competing supplier (with 30% of the market) -- and Farmitalia's only competitor for the sale of solution form doxorubicin -- was deprived of its only viable finisher/distributor and eliminated from the market. Farmitalia's market share surged, practically overnight, from 60% back to 89%. Instead of three suppliers competing at the wholesale level -- Farmitalia (60%); Sicor (30%); and Meiji (9%) -- there were now only two -- Farmitalia (89%) and Meiji (11%).[5] As for the fastest growing segment of the

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and to obtain all future bulk doxorubicin requirements from Farmitalia.

[5]/Meiji's minimal presence in the market was based on long-term supply arrangements with two fringe distributors, Bristol Myers and Astra, which sold branded generic doxorubicin products under a license agreement with Farmitalia. As the record indicates, these two

U.S. doxorubicin market, the physician-preferred solution form, the exclusive CBVT-Farmitalia arrangement once again made Farmitalia the sole player in that important market segment.

As a result of Sicor's exclusion from the market (as a supplier of Mercian or its own bulk doxorubicin), Farmitalia was able to dictate the price structure for both brand-name and generic doxorubicin in the U.S. market. After Sicor had been removed from the market through the loss of its distributor, the price of doxorubicin stabilized at an artificially high level. Moreover, Farmitalia's own internal documents acknowledged that, but for the elimination of generic competition, a further decline in the price of doxorubicin was anticipated.

B. The Proceedings Below

On April 25, 1991, Sicor filed suit in the United States District Court for the Northern District of California alleging that the exclusive supply contract between Farmitalia and CBVT violated §§ 1 and 2 of the Sherman Act. Sicor also brought California State law claims against CBVT for breach of the Supply and Distribution Agreements between Sicor and CBVT. The federal law claims which are at issue here were brought in the District Court pursuant to the provisions of 28 U.S.C. §§ 1331 and 1337.

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companies did not compete vigorously in terms of pricing, and their ability to compete was further limited because they were paying Farmitalia royalties. After Sicor's elimination from the market, Farmitalia had at least some form of price control or influence over all four distributors -- either through its exclusive supply arrangements with CBVT and Erbamont, or its royalty agreements with Bristol Myers and Astra.

The District Court granted summary judgment against Sicor on all counts. It held that under the Supply Agreements between Sicor and its distributor, CBVT, Sicor was obligated to supply doxorubicin manufactured at its Italian facility rather than doxorubicin which met defined U.S. pharmacopoeia quality standards. As to the antitrust counts, the District Court called the exclusive dealing contract "pro-competitive," holding that notwithstanding the elimination of the only significant generic manufacturer which had entered the U.S. market there was no net change in competition because the number of down stream distributors remained the same. The District Court ignored Farmitalia's vertical control over and exclusive dealing contracts with the distributors, and the adverse effect upon price competition caused by recapture of a monopoly share of the market. The District Court entered a Final Judgment of Dismissal of Plaintiffs' Claims under Fed.R.Civ.P. Rule 54(b) on March 19, 1993.

On April 2, 1993, Sicor appealed to the United States Court of Appeals for the Ninth Circuit pursuant to 28 U.S.C. §1291.[6] On appeal, the Court of Appeals for the Ninth Circuit reversed the District Court's grant of summary judgment on the State law contract claims. It held that there was ample evidence in the record to support Sicor's contention that its supply contract provided for and entitled it to supply FDA approved doxorubicin from an alternate source to its Italian facility.

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[6]/Sicor noticed for appeal the District Court's ruling with respect to all antitrust and pendant state law claims against all the Cetus, Ben Venue, Erbamont and Farmitalia defendants. On August 13, 1993, a "Stipulation Regarding Voluntary Dismissal of Appeal" was filed with respect to Erbamont N.V., Erbamont, Inc. and Farmitalia Carlo Erba, S.r.l. This stipulation dismissed only these parties and kept intact Sicor's antitrust claims against the Cetus and Ben Venue parties to this proceeding.

The Circuit Court upheld the grant of summary judgment on the antitrust count, however, reiterating the District Court's conclusion that the restoration of a 90% monopoly in the supply of doxorubicin was "pro-competitive" because the exclusive supply contract permitted doxorubicin *produced* by Farmitalia to be distributed by CBVT in addition to the distribution through Farmitalia's own subsidiary. The Circuit Court ignored the demise of price competition at the consumer level.

The Circuit Court also held that the exclusive dealing contract was excused from antitrust liability because it was made with a valid business justification. The specific justification offered by the Court was that it enabled Farmitalia to make more money.

The Court also asserted that the exclusive supply arrangement permitted CBVT to remain in business as a distributor. CBVT would have remained in business as a distributor in any event, however, since Sicor had provided for a continuing supply of bulk doxorubicin in accordance with the terms of its existing supply contract with CBVT. Thus, but for the exclusive dealing contract which restored the monopoly on source of product and eliminated price competition, there would have been two manufacturers competing on the basis of price, each served by a different distributor.

REASONS FOR GRANTING THE PETITION

1. The Conclusion That the Farmitalia/CBVT Arrangement Was Pro-Competitive Conflicts With This Court's Antitrust Principles

The dominant manufacturer's new contract to become the exclusive supplier to its principal competitor's only distributor eliminated price competition and restored it to an 89% share of the market. This exclusive dealing agreement was said to be exempt from trial on the merits because, as a matter of law, there was no liability under the Sherman Act. The Ninth Circuit held that exclusion of the monopolist's competitor through capture of the competitor's only distributor could not have an anticompetitive effect since the number of *distributors* remained the same. The Ninth Circuit deemed it immaterial that the exclusive dealing contract had the intended effect of eliminating competition at the manufacturing level.

The circuit court also stated that it was "beside the point" that the number of *viable* distributors was limited. (App. 14a). It held that irrespective of any high entry barriers to the market, the elimination of the only manufacturer which competed on the basis of price merely left the market where it was before that competitor's entry into the market. There are three responses to this conclusion.

First, the market did not remain where it was prior to the elimination of Sicor. At the time of Sicor's displacement, doxorubicin manufactured by Farmitalia accounted for 60% of the market; Sicor's doxorubicin accounted for 30% of the market; and fringe sales, not made on a price competitive basis, accounted for a fairly constant 10% of the market. After the exclusive dealing contract between Cetus and Farmitalia was signed, doxorubicin manufactured by Farmitalia accounted for 89% of the market and the price differential between

doxorubicin sold by Farmitalia's subsidiary and the price at which it had been offered through Sicor's distributor had essentially vanished. Thus, to characterize the market situation as unchanged, because the same number of distributors remained, is inaccurate.

Second, the Ninth Circuit failed to consider that prior to Sicor's entry the market was a monopoly market, albeit a lawful patent monopoly. Once that patent monopoly had expired, however, there was no reason for the market to remain a monopoly market. The elimination of Sicor and the resulting restoration of the monopoly cannot be exempt from antitrust scrutiny on the basis that the exclusive dealing contract merely restored the monopoly.

Third, the basis for any comparison should not have been the state of the market prior to Sicor's entry, because Sicor's entry as a low priced competitor of a generic pharmaceutical product was an established fact. It had already succeeded in obtaining a 30% share of the market through price competition, which resulted in a 40% decrease in the price of doxorubicin to cancer patients.

This Court should review the decision of the court of appeals because the legal principles adopted in the decision are markedly contrary to important prior precedents of this Court. This Court has held that exclusive dealing contracts between a dominant vertically integrated manufacturer-distributor and independent distributors which are alleged to unfairly restrain trade are to be examined under a rule of reason analysis. By looking *only* to the number of distributors remaining in the market, the Ninth Circuit's holding discards the necessity for such a test. It thereby presents an important federal question as to whether this Court's holdings have been modified or are no longer applicable.

The essence of the Ninth Circuit's holding is that no further analysis is necessary if a vertically integrated monopolist offers increased profit as its business justification for eliminating competitors by signing exclusive dealing contracts with their distributors *so long as there is no change in the number of distributors*. This rationale, which would apply in other situations if the precedent stands, is incompatible with the holdings of this Court in *United States v. Yellow Cab Co.*, 332 U.S. 218 (1948) and *Standard Oil of California v. United States*, 337 U.S. 293 (1949).

The decision also conflicts with the holding of this Court in *Board of Trade of City of Chicago v. United States*, 246 U.S. 231 (1917), in which the Court outlined the analysis required to determine whether there has been an unreasonable restraint of trade. It held that the true test of legality is whether the restraint -- here the exclusive dealing contract -- " . . . promotes competition or whether it is such as may suppress or even destroy competition." *Id.* at 237. To resolve that question, "the court must ordinarily consider the facts peculiar to the business under which the restraint is applied," including conditions before and after the restraint was imposed. *Id.* at 238. The Ninth Circuit's opinion effectively eliminates this requirement. As noted, the only tests which the circuit court required to be imposed in analyzing market preemption through an exclusive dealing contract is the profit making motive of the seller and the buyer and whether any distributors -- not manufacturers -- have been eliminated.

In *Yellow Cab*, the Court found that §1 and §2 of the Sherman Act were violated by vertical arrangements in which the dominant manufacturer of taxi cabs and its vertically integrated taxi companies contracted with other local cab companies to purchase taxis exclusively from Yellow Cab. The effect of these contracts was to foreclose 15% to 100% of various city markets to other

manufacturers. The Court noted that not only could competing manufacturers of taxi cabs no longer sell to these local taxi companies, but that these local taxi companies which otherwise might have looked to another taxi manufacturer for a more competitive purchase price no longer had that opportunity.

In *Standard Oil of California*, the Court struck down exclusive dealing contracts through which an integrated producer-distributor obtained the exclusive right to supply additional independent distributors of gasoline.[7] In *Standard Oil*, the defendant was the largest seller of gasoline in the relevant market with an overall 23% share of the market. Approximately half of its sales to the automobile market were made through company owned service stations and half were made under exclusive dealing contracts with independent service stations. (Additional sales were made to industrial users.) The gasoline market was an oligopoly market and was not nearly as concentrated as the monopoly market for doxorubicin. The Court held that the most important factor in determining whether the exclusive dealing contracts were lawful or unlawful would be the degree of market control resulting from the arrangements. *Standard Oil* at 308. The greater the dominance, the stronger the inference that the requirement contracts had been used to stifle competition rather than to serve legitimate economic needs. *Id.*

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[7]/The government attacked the exclusive dealing contracts as violative of §1 of the Sherman Act and §3 of the Clayton Act, 15 U.S.C. §§1, 14. Although the Court's analysis was couched in terms of the restriction on exclusive dealing articulated in §3 of the Clayton Act, the analysis in the instant case would be no different for purposes of the Sherman Act. See *Tampa Electric Co. v. Nashville Coal Co.*, 365 U.S. 320 (1961), for continued discussion of the interplay between these two complementary statutory prohibitions on anticompetitive exclusionary contracts.

These cases, and others, collectively hold that challenges to exclusive dealing contracts as anticompetitive must be examined with reference to the nature of the restraint and the share of market which is foreclosed as a result of the contracts. It presents an important Federal question as to whether, therefore, summary judgment may be granted as a mater of law where the undisputed record confirmed an overwhelming degree of dominance, the elimination of the only significant competition, and cessation of price competition at both the distribution and manufacturing level.

2. The Ninth Circuit's Pro-Competitive Analysis Conflicts With Other Circuits' Precedent

In addition to undermining the long-standing standard established by this Court for determining Sherman Act violations, the Ninth Circuit's decision conflicts with other circuits' legal criteria for determining the anticompetitive effects of exclusive dealing arrangements. If the Ninth Circuit opinion is not reversed, there will be different standards and different results among the circuits when exclusive dealing arrangements resulting in monopolization are scrutinized.

A prime example of the conflict which the Ninth Circuit's decision has engendered can be found in *Perington Wholesale, Inc. v. Burger King Corp.*, 631 F.2d 1369 (10th Cir. 1979). In *Burger King*, the Tenth Circuit held that an exclusive dealing arrangement which foreclosed part of the market to products of a competing supplier -- even though the number of distributors remained the same -- presented a triable question of whether competi-

tion was restrained in violation of the Sherman Act.[8] In reversing the district court's summary dismissal of the complaint, the Tenth Circuit found that the elimination of an alternative-source distributor, and its replacement by a distributor whose exclusive source of supply was the existing dominant supplier/distributor in the market, could constitute "a substantial lessening of competition in the market." *Id.* at 1375.

There, as here, the only significant alternative supplier was frozen out of the market, and buyers had to purchase either directly from the dominant supplier (through its wholly-owned distribution network) or from the so-called competing distributor (who was contractually limited to selling only those products of the dominant supplier). As noted by the Tenth Circuit:

> The antitrust vice of these arrangements is the foreclosure of part of the market in which the seller competes by taking away the freedom of the buyer to choose from the products of competing traders in the seller's market.

Id. at 1374.

Moreover, the Tenth Circuit made clear that where, as here, the arrangement lessens competition at the supply level, the Sherman Act is violated even if the dominant supplier's motivation is solely to "increase its share of the

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[8]/For purposes of its antitrust analysis, the Tenth Circuit held that a requirements contract is "functionally the same" as an exclusive supply agreement "if it commits the buyer to acquire all the products it needs from the seller." *Id.* at 1374. Citing this Court's holding in *United Shoe Mach. Corp. v. United States*, 258 U.S. 451, 457 (1922), the Circuit Court went on to state that "[t]he agreement need not specifically require the buyer to forego other supply sources if the practical effect is the same." *Perington Wholesale, Inc.*, 631 F.2d at 1374.

relevant market" rather than "a desire to damage" its competitor "or put it out of business." *Id.* at 1374.

Also in conflict with the Ninth Circuit's decision is the Third Circuit's holding in *SmithKline Corp. v. Eli Lilly & Co.*, 575 F.2d 1056 (3d Cir. 1978). There, as in this case, the court was faced with a defendant pharmaceutical company which enjoyed the "awesome power of . . . a legal monopolist when it was engaged in the manufacture and sale of its original patented products . . . ." *Id.* at 1065. Eli Lilly, like Farmitalia/Erbamont, controlled "from 100% to 89.8%" of the specific drug market prior to the expiration of its patent monopoly.[9] *Id.* Through market practices analogous to Farmitalia/ Erbamont's exclusive dealings arrangement with CBVT, Eli Lilly was able to maintain its monopolistic market share after its patent monopoly expired.[10]

In contrast to the Ninth Circuit's analysis, however, the Third Circuit found nothing "pro-competitive" about a monopolist's ability to maintain the status quo after its patent's expiration. As explained by the Third Circuit:

> Although it enjoyed the status of a legal monopolist when it was engaged in the manufacture and sale of its original patented products, that status changed . . . . The goal of [Eli Lilly's post-patent market actions] was to associate Lilly's legal monopolistic practices with an illegal activity that directly affected

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[9]/"Notwithstanding that its position in the market was orginally the result of its patents," the Third Circuit considered this share to be "monopolistic." *Id.*

[10]/Eli Lilly sought to limit its only significant competing supplier's ability to market a rival drug by linking rebates on the product with sales of other drugs on which Eli Lilly faced no competition.

> the price, supply, and demand of [the drugs]. Were it not for Lilly's [action], the price, supply, and demand of [the drugs] would have been determined by the economic laws of a competitive market. [Lilly's post-patent market actions] blatantly revised those economic laws and made Lilly a transgressor under §2 of the Sherman Act.

Id. at 1065.

Under the Third Circuit's analysis in *Eli Lilly*, the fact that the number of competitors in the market remained the same before and after the expiration of the patent monopoly was immaterial. The proper focus -- one which the Ninth Circuit's decision erroneously ignores -- is whether the monopolist "entrenched [its] position as a supplier" after the expiration of the patent in a way that "made competition from a new entrant to the market unlikely." *Id.* at 1065. Applying the Third Circuit's standard to this case, where the monopolist regained its 89% share of the market; where the sole significant competitor (with a 30% share) is eliminated; and where the previously falling product price immediately stabilizes at an artificially high price, would unquestionably lead to a contrary result to the Ninth Circuit's improper affirmance of summary dismissal of all antitrust claims.

The Ninth Circuit's decision also conflicts with longheld precedent of the Second Circuit which states that "[w]here the alleged violator dominated or was a leader in the industry, proof of such fact was . . . determined to be a sufficient predicate from which to conclude that the use of exclusive-dealing contracts was violative" of the antitrust laws. *Dictograph Products v. Federal Trade*

Comm'n, 217 F.2d 821, 827 (2d Cir. 1954).[11] The Second Circuit emphasized that even though the number of manufacturers in the market had risen more than four-fold in three years, the defendant's contention that "competition in the industry has . . . increased" was rendered irrelevant by the fact that "petitioner has maintained its position, during all this period of growth in the industry . . . by means of . . . restrictive, exclusive dealing agreements." *Id.* at 824.

Properly focusing on the share of the market affected by the exclusive dealing arrangement (and its effect on the participants' ability to maintain market power), the Second Circuit held that Dictograph's exclusive dealing contracts were illegal despite the fact that the defendant was merely one of the three largest suppliers in an oligopolistic market, and its exclusive dealing arrangement was determined to affect only 22% of the relative market's distribution outlets. Even under §1's heightened standard, Farmitalia/Erbamont's arrangement with CBVT, which propelled Farmitalia back to a market monopoly share of 89% and foreclosed 30% of the market from its only significant competitor, would warrant a similar finding of illegality under the Second Circuit's standard.

A similar conflicting result would be had under the Sixth Circuit's §3 standard espoused in *United States v. Dairymen, Inc.*, 660 F.2d 192 (6th Cir. 1981). Stating that the district court had set "too high a burden" for showing anticompetitive practices, the Sixth Circuit remanded the

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[11]/The Second Circuit's holding in *Dictograph* involved an alleged violation of § 3 of the Clayton Act. As this Court has noted on several occasions, the analysis for § 1 Sherman Act and § 3 Clayton Act violations is similar even though the threshold for determining injury to competition is slightly higher under § 1. *See Tampa Electric*, 365 U.S. at 325-29, 335.

dismissal of plaintiff's exclusive dealing claims for further analysis as to whether the "contracts were intended to stifle competition" in light of "the relevant strength of the parties, the proportionate volume of commerce involved in relation to the total volume of commerce in the relevant market area, and the probable immediate and future effects which pre-emption of that share of the market might have on effective competition therein." *Id.* at 194-95, *quoting, Tampa Electric Co.*, 365 U.S. at 329.

On remand the district court held that "[e]ven though there are sound and legitimate reasons for entering into full-supply or committed supply contracts," Dairymen, Inc.'s control of nearly 60% of the market, coupled with "the timing of the execution of [the exclusive dealing] contracts . . . renders them in violation of Section 3 of the Clayton Act." *United States v. Dairymen, Inc.*, 1983-2 Trade Cases ¶65,651, 1983 WL 1880 (W.D. Ky. June 9, 1983), aff'd, 758 F.2d 654 (1985). This result is diametrically opposite to that reached by the Ninth Circuit.

3. "Making Money" Is Not A Valid Business Reason for Monopolizing

A second fundamental flaw in the Ninth Circuit's holding is its conclusion that a monopolist's desire "to make money" constitutes a valid business justification which eliminates antitrust liability. (App. 13a). As stated by the Ninth Circuit:

> Moreover, it is apparent from the materials before us that valid business reasons existed for CBVT's action, *i.e.*, CBVT's reason for buying from Farmitalia was to obtain the product, and Farmitalia's reason for selling that product to CBVT was to make money. In the absence of a showing of selling at a loss

> or similar conduct explainable only by a motive to reduce or eliminate competition, the appellants' claim is not persuasive. If there is a valid business reason for [the defendant's] conduct, there is no antitrust liability.

(App. 13a, emphasis added, citation omitted).

This erroneous conclusion of law is contrary to the Supreme Court principles for "rule of reason" analysis, and is in conflict with holdings in other circuits. The proposition that a monopolist's actions do not violate the antitrust laws merely because they are motivated by profit finds no support in any precedent in any circuit, and would lead to the irrational result of immunizing a monopolist's predatory acts, so long as they were financially successful. That is clearly not the law as articulated by this Court or in other circuit courts.

In a conflicting opinion, the Fifth Circuit held:

> There can be no doubt that becoming a complete monopoly may improve a business' financial condition. But becoming a monopoly simply to make more money is not a "legitimate business justification" for "monopolizing".

Poster Exchange, Inc. v. National Screen Serv. Corp., 431 F.2d 334, 340 (5th Cir.), *cert. denied*, 401 U.S. 912 (1970).

The Second Circuit reiterated this principle in *Delaware & Hudson Ry. Co. v. Consolidated Rail Corp.*, 902 F.2d 174 (2d Cir.), *cert. denied*, 500 U.S. 928 (1990). In that case, the defendant monopolist, Conrail, successfully argued to the district court that "since the [defendant's conduct] was intended to increase short-term, as well as long-term, profits, Conrail is insulated from [antitrust] liability." *Id.* at 178. On the appeal from the district court's grant of summary judgment in favor of Conrail, the Second Circuit rejected Conrail's contention that "conduct which has profit maximization as a goal cannot violate

§2." *Id.* Reversing the district court's summary dismissal of plaintiff's antitrust claims, the Second Circuit stated:

> A monopolist cannot escape liability for conduct that is otherwise actionable simply because that conduct also provides short-term profits.

Id. at 178.

The Ninth Circuit's holding that "making money" constitutes a valid business reason set a conflicting standard with the decisions by the Fifth and Second Circuits as to what constitutes monopolization. The identical conduct which the Ninth Circuit holds to prevent a finding of monopolization is not accepted as an excuse by other circuits. Moreover, the money-making justification espoused by the Ninth Circuit, if allowed to stand, would eviscerate the parameters which this Court has established for proper "rule of reason" analysis in antitrust cases.

In *National Soc. of Professional Eng'rs v. United States*, 435 U.S. 679 (1978), this Court outlined the boundaries for analyzing whether valid business reasons justified an otherwise anticompetitive act. Citing the "Rule of Reason" as a "central principle of antitrust analysis," this Court emphasized:

> Contrary to its name, the Rule does not open the field of antitrust inquiry to any argument in favor of a challenged restraint that may fall within the realm of reason. Instead, it focuses directly on the challenged restraint's impact on competitive conditions.

Id. at 688.

Valid business reasons for restraints which "impact on competitive conditions" have been described by this Court as "superior service, lower costs, and improved

efficiency." *Otter Tail Power Co. v. United States*, 410 U.S. 366, 380-81 (1973). Such motivations further the overall purpose of the antitrust laws in that they tend to benefit consumers, even if they might otherwise harm competing businesses. No such laudatory or beneficial purpose can be attached to a monopolist's innate desire to "make money."

Not only does the Ninth Circuit's "money-making" business justification run afoul of well-settled antitrust precedent, it totally ignores the unrebutted evidence of record in this case as to the defendants' true business reason for their anticompetitive acts. As was made clear by the defendants' own business documents, the driving motivation for eliminating Sicor from the market was to tie up CBVT, the only remaining viable finisher/distributor and a leading player in the generic doxorubicin market, thus ensuring a larger share of the total doxorubicin market. As a result of their agreement with CBVT, Farmitalia's share of the total doxorubicin units sold increased to 89%.

Thus, the Ninth Circuit's "business justification" holding in this case erred in two key respects. First, it immunized the defendants' violative acts on the erroneous ground that a monoplist's desire to "make money" constituted a valid business reason. Secondly, it did so on the basis of an improper summary judgment determination that ignored unrebutted evidence of the defendants' anticompetitive intent. Whether valid business reasons motivated a monopolist's conduct is a question of fact, *see Eastman Kodak Co. v. Image Technical Servs., Inc.*, ___ U.S. ___, 112 S. Ct. 2072, 2091 (1992), and the Ninth Circuit has departed from this Court's policy with respect to summary judgment determinations.

4. A Monopolist's Stabilization of Declining Market Prices Constitutes an Injury to Competition

The essence of the antitrust laws is to ensure fair price competition in an open market. *Reiter v. Sonotone Corp.*, 442 U.S. 330, 342 (1979). When the market is manipulated to exclude competition and stabilize prices, an injury to competition occurs. *United States v. Container Corp. of America*, 393 U.S. 333, 337 (1969).

Ignoring these fundamental principles, the Ninth Circuit has adopted an erroneous standard under which no antitrust claim could prevail unless accompanied by evidence of "output decreases or price increases" in the market.

> [T]he factual support needed to show injury to competition must include proof of the . . . restraints anticompetitive effects within those [relevant geographic and product] markets . . . . proof of actual detrimental competitive effects such as output decreases or price increases.

(App. 11a-12a).

This impermissibly narrow interpretation of competitive injury is contrary to the opinion in *Container Corp.*

> Stabilizing prices as well as raising them is within the ban of §1 of the Sherman Act. As we said in *United States v. Socony-Vacuum Oil Co.*, [310 U.S. 150 (1940)], at 223 . . . "in terms of market operations stabilization is but one form of manipulation."

Container Corp., 393 U.S. at 337.

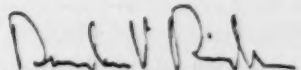
Thus, by applying a standard that disregarded uncontested evidence that Farmitalia and CBVT's exclusive arrangement had stabilized previously declining prices

at an artificially high level, the Ninth Circuit has created an exception to antitrust law interpretation by this Court.

CONCLUSION

The Ninth Circuit's opinion adopts a standard for analyzing, and excepting from antitrust liability, exclusive dealing contracts which undermines the standard enunciated by this Court, and which conflicts with the standard utilized by other circuit courts. Accordingly, the Petition for Writ of Certiorari should be granted.

Respectfully submitted,



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SICOR LIMITED; ALCO CHEMICALS, LTD., Plaintiffs-Counter-Defendants-Appellants, and SICOR S.p.A., Counter-Defendant, v. CETUS CORPORATION; CETUS GENERIC CORPORATION; BEN VENUE LABORATORIES, INC.; BEN VENUE GENERIC CORPORATION; and ERBAMONT N.V., Defendants-Appellees, and CETUS-BEN VENUE THERAPEUTICS; ERBAMONT, INC.; and FARMITALIA CARLO ERBA, S.r.l., Defendants-Counter-Claimants-Appellees.

SICOR LTD. v. CETUS CORP.
No. 93-15667

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

51 F.3d 848; 1995 U.S. App. LEXIS 6614; 1995 Trade Cas. (CCH) P70,945; 95 Cal. Daily Op. Service 2392; 95 Daily Journal DAR 4180

July 12, 1994, Argued, Submitted, San Francisco, California. April 3, 1995, Filed

PRIOR HISTORY: Appeal from the United States District Court for the Northern District of California. D.C. No. CV-91-01253-DLJ. D. Lowell Jensen, District Judge, Presiding.

COUNSEL: Douglas V. Rigler, Whitman & Ransom, Washington, D.C.; and Josef D. Cooper, Cooper & Kirkham, San Francisco, California, for the plaintiffs-counter-defendants-appellants.

Charles B. Cohler, Lasky, Haas, Cohler & Munter, San Francisco, California, for the defendants-counter-claimants-appellees.

JUDGES: Before: Herbert Y.C. Choy, Edward Leavy, and Andrew J. Kleinfeld, Circuit Judges. Opinion by Judge Leavy.

OPINION BY: LEAVY

OPINION

LEAVY, Circuit Judge:

Two foreign corporations filed the instant action in federal district court against several foreign and domestic companies, asserting federal antitrust claims and state law causes of action for breach of contract, interference with contractual relations, and indebitatus assumpsit. The district court entered summary judgment in favor of the defendants on all claims, and the plaintiffs have appealed. We affirm in part, reverse in part, and remand.

FACTS AND PRIOR PROCEEDINGS

Doxorubicin hydrochloride ("doxorubicin") is a chemical used in the treatment of some fourteen different types of cancer. Although it is one of the most effective and widely sold anti-cancer drugs available in the United States, it is also highly toxic in bulk form and must be specially prepared and packaged, or "finished," before it can be marketed in dosage form. Consequently, a distributor of bulk doxorubicin must obtain approval from the Food and Drug Administration ("FDA") of the

distributor's source (i.e., the manufacturer of the bulk doxorubicin) before turning it over to a finisher.

Erbamont N.V., a Netherlands Antilles company, once enjoyed a virtual monopoly on the sale of doxorubicin in the United States through its Italian subsidiary, Farmitalia Carlo Erba, S.r.l. ("Farmitalia"). Farmitalia, which had developed the techniques necessary to produce doxorubicin in commercial quantities, held an American patent on the drug's production until June 1988, as well as related patents on certain other production techniques until April 1991. Farmitalia marketed doxorubicin in the United States under the label Adriamycin exclusively through Erbamont N.V.'s wholly owned American subsidiary, Erbamont, Inc., and its Adria division (collectively, "Erbamont").

Shortly before the expiration of Farmitalia's product patent, another Italian firm, Sicor S.p.A., decided to enter the American market by manufacturing generic doxorubicin under an arrangement with its wholly owned United Kingdom subsidiary, Sicor Limited, which owned the microorganism from which doxorubicin is produced. As neither Sicor S.p.A. nor Sicor Limited (jointly, "Sicor") had an American presence or sales network, Sicor entered into a distribution agreement with Alco Chemicals, Ltd. ("Alco"), a U.K. corporation, and a finishing agreement

with Cetus-Ben Venue Therapeutics ("CBVT"),[1] a California partnership, in late 1987.

On February 1, 1988, Alco and CBVT executed a distribution agreement, dated as of November 5, 1987 ("Distribution Agreement"), in which Alco appointed CBVT to act as its exclusive American distributor of Sicor-manufactured doxorubicin to be finished by CBVT under the provisions of Sicor's contract with CBVT ("Supply Agreement"). In exchange for this exclusive arrangement, CBVT was to pay Alco $ 1,000,000 and distribution fees equal to 50% of CBVT's revenues from the sale of finished doxorubicin, net of CBVT's expenses in buying bulk doxorubicin under the Supply Agreement and various taxes, rebates, and other charges.

Farmitalia and Erbamont ("Farmitalia Group") responded immediately to this challenge to their dominant position in the United States market. In 1988, Erbamont unsuccessfully sought an injunction from the United States International Trade Commission ("ITC") against CBVT's importation of SICOR-manufactured doxorubicin on the ground of patent infringement. Shortly thereafter, CBVT

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[1]/CBVT was formed by two general partners, Cetus Generic Corporation ("CGC") and Ben Venue Generic Corporation ("BVGC"). CGC, a Delaware corporation with its principal place of business in California, was a subsidiary of Cetus Corporation, which also was a Delaware corporation based in California. BVGC, an Ohio corporation, is a subsidiary of Ben Venue Laboratories, Inc., a Pennsylvania corporation with its principal place of business in Ohio. In 1992, Cetus Corporation changed its name to Cetus Oncology Corporation following its acquisition by merger with Chiron Corporation. CGC remains a wholly owned subsidiary of Cetus Oncology Corporation.

filed an antitrust and unfair competition action against the Farmitalia Group in federal district court.

Meanwhile, Alco and CBVT amended the Distribution Agreement on April 10, 1989 ("First Amendment"). Among other things, the First Amendment modified the terms governing CBVT's payment of distribution fees to Alco and established a reimbursement account to fund CBVT's pursuit of antitrust claims against the Farmitalia Group. That same day, Sicor and CBVT entered into a superseding agreement, retroactively dated November 5, 1987 ("Second Supply Agreement"), separating Sicor's supply obligations from Alco's distribution commitments under the Distribution Agreement.[2] By letter agreement dated October 8, 1990 ("Second Amendment"), Alco and CBVT further amended the Distribution Agreement to permit CBVT to deduct from distribution fees owed to Alco 50% of CBVT's costs in pursuing its legal claims against the Farmitalia Group.

On May 25, 1989, CBVT made its first American sale pursuant to the Second Supply Agreement, thereby starting the running of the contract's three-year term. Between June 1989 and September 1990, CBVT made substantial inroads into Erbamont's dominant position in the American doxorubicin market. By underpricing its main competitor on sales of doxorubicin in both powder

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[2]/Although Sicor alleges that the two parties also orally agreed that CBVT would pursue its antitrust and unfair competition claims against the Farmitalia Group in consideration for Alco's payment of one-half of the associated litigation costs, the parties dispute the existence and enforceability of any such agreement. *See infra.*

and solution form, CBVT increased its market share from 0% to 30%. During this same time period, two smaller competitors held a combined market share of approximately 9%. Erbamont's market share declined correspondingly.

The Farmitalia Group did not ignore this competition. In addition to the failed ITC claim, Farmitalia initiated legal proceedings in Italy against Sicor, alleging theft of a proprietary microorganism essential to the production of doxorubicin. Although the action was eventually dismissed, Farmitalia obtained a temporary injunction against Sicor S.p.A.'s doxorubicin production facility in Milan on July 21, 1989. The plant remained closed until March 1990, when it reopened temporarily. On September 21, 1990, the plant was again shut down pursuant to an Italian court's sequestration decree. The plant has remained closed since then.

In response to the production halt at its plant in Italy, Sicor notified CBVT and sought to obtain supplies of bulk doxorubicin from other firms to meet its interim needs. On October 9, 1990, CBVT and Sicor met with Pharmachemie, B.V., a European distributor of Sicor-manufactured doxorubicin. Pharmachemie offered CBVT 2.4 kilograms of FDA-approved, Sicor-produced bulk doxorubicin. CBVT declined the offer, explaining that its inventory of Sicor-produced bulk doxorubicin would last until the following summer.

Meanwhile, Sicor and CBVT modified their supply arrangement by agreement dated October 8, 1990 ("Letter

Agreement").[3] The Letter Agreement revised the pricing formula for CBVT's purchases of doxorubicin and extended from 60 to 180 days the payment period for Sicor's invoices to CBVT. In addition, the Letter Agreement required CBVT to remit to Sicor 50% of its proceeds, net of various discounts and rebates, from sales of doxorubicin in the United States. Also pursuant to the Letter Agreement, the parties confirmed and ratified the remainder of the Second Supply Agreement.

In the meantime, Sicor sought an alternate producer to perform its contractual supply obligations. This search led to Mercian Corporation ("Mercian"), a Japanese company with prior FDA approval as a producer of bulk doxorubicin and an ongoing relationship with Sicor. Before Mercian could fill CBVT's orders from Sicor, however, CBVT would be required to obtain FDA approval as a finisher of Mercian-manufactured bulk doxorubicin, an administrative process with an expected time length the parties dispute: CBVT contended that FDA approval would take up to eighteen months, while Sicor estimated no more than five months. Accordingly, in late 1990, Sicor and Mercian began negotiating an agreement allowing Mercian to supply bulk doxorubicin in Sicor's stead under the terms of the Second Supply Agreement.[4]

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[3]/Not to be confused with Alco and CBVT's Second Amendment, also of that date. *See supra.*

[4]/The parties dispute whether these negotiations gave rise to a contract. *See infra.*

On January 25, 1991, Sicor shipped a 220-gram sample of Mercian-produced doxorubicin to CBVT to facilitate the latter's batch testing and preparation of an FDA application. Sicor expected CBVT to complete and file this application shortly after April 10, 1991, the expiration date of an adverse Farmitalia process patent. On February 22, 1991, CBVT outlined for Sicor various scenarios for launching sales of finished, Mercian-produced doxorubicin in the United States by as early as September 1991.

Meanwhile, CBVT was negotiating with the Farmitalia Group to settle its antitrust and patent suit against them and to secure an alternate source of bulk doxorubicin. CBVT disclosed these negotiations in a meeting with Sicor in March 1991. By letter received April 10, 1991, CBVT formally notified Sicor and Alco that CBVT and Erbamont had agreed to enter into an exclusive supply and distribution arrangement for Farmitalia-produced bulk doxorubicin, that CBVT had settled its litigation against the Farmitalia Group, and that CBVT would not be free to begin the bulk supply relationship contemplated by the parties.

On April 25, 1991, Sicor and Alco filed the instant action in federal district court against CBVT[5] and the Farmitalia Group, alleging breach of contract, tortious interference with contract, and unjust enrichment, as well as anticompetitive acts and monopolization of the Ameri-

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[5]/"CBVT" is here meant to include the Cetus Corporation, Cetus Generic Corporation, Ben Venue Laboratories, Inc., and Ben Venue Generic Corporation, as well as Cetus-Ben Venue Therapeutics. *See* note 1, *supra*.

can doxorubicin market in violation of federal law. On July 14, 1992, CBVT and the Farmitalia Group separately moved for summary judgment or, in the alternative, partial summary judgment on all claims. Following briefing and oral argument, the district court granted the motions for partial summary judgment on January 11, 1993, and entered final judgment pursuant to Fed. R. Civ. P. 54(b) two months later in favor of all defendants. Alco and Sicor have timely appealed.

ANALYSIS

I. *Federal Antitrust Claims*

A. Standard of Review[6]

We review de novo a district court's grant of summary judgment, applying the same standards as would the lower court. *Bassette v. Stone Container Corp.*, 25 F.3d 757, 759 (9th Cir. 1994). In opposing a motion for summary judgment in an antitrust case, the nonmoving party "must do more than simply show that there is some metaphysical doubt as to the material facts[,]" *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586 (1986); *i.e.*, summary judgment is appropriate "if the pleadings, depositions, answers to interrogatories, and admissions on

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[6]/While summary judgment has historically been disfavored in antitrust cases, *see High Tech. Careers v. San Jose Mercury News*, 996 F.2d 987, 989 (9th Cir. 1993) (citing *Christofferson Dairy, Inc. v. MMM Sales, Inc.*, 849 F.2d 1168, 1171 (9th Cir. 1988)), this may no longer be so. *See Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 586, 588 (1986); *Bhan v. NME Hosps., Inc.*, 929 F.2d 1404, 1409 (9th Cir.), *cert. denied*, 502 U.S. 994 (1991). Regardless of whether or not summary judgment is still disfavored in antitrust cases, we conclude for the reasons set forth in Part I.B. that summary judgment was appropriate on the appellants' antitrust claims.

file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247 (1986). Thus, while the moving party has the initial burden of establishing the absence of a genuine issue of material fact, *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986), the nonmoving party must go beyond the pleadings and identify facts showing the existence of a genuine issue for trial. *Id.* at 324.

B. Discussion[7]

Sicor and Alco ("appellants") contend that the district court overlooked genuine issues of material fact as to whether the Farmitalia Group and CBVT (collectively, "appellees") committed anticompetitive acts injurious to competition and to the appellants in violation of Sections 1 and 2 of the Sherman Antitrust Act, 26 Stat. 209, ch. 647, §§ 1, 2 (July 2, 1890), *codified at* 15 U.S.C. §§ 1, 2. Each of these arguments will be discussed in turn.

1. The Section 1 Claim

[1] Section 1 of the Sherman Act prohibits "[e]very contract, combination . . . or conspiracy, in restraint of

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[7]/The appellants' initial contention is that the district court failed to distinguish properly between "specific facts" and "substantial evidence," and thereby applied an incorrect legal standard for summary judgment in an antitrust case. *See T.W. Elec. Serv. v. Pacific Elec. Contrs. Ass'n*, 809 F.2d 626, 632 (9th Cir. 1987). Because the district court's grant of summary judgment was premised on its holding that there was no proof of any injury to competition, any error - if such it was - involving a confusion of "substantial evidence" with "specific facts" was clearly harmless.

trade or commerce among the several States[.] . . ." 15 U.S.C. § 1. "[T]o establish a claim under § 1 of the Sherman Act, the plaintiff must show 1) that there was a contract, combination, or conspiracy; 2) that the agreement unreasonably restrained trade under either a per se rule of illegality or a rule of reason analysis; and 3) that the restraint affected interstate commerce." *Bhan v. NME Hosps., Inc.*, 929 F.2d 1404, 1410 (9th Cir.) (citing *T.W. Elec. Serv. v. Pacific Elec. Contrs. Ass'n.*, 809 F.2d 626, 632-33 (9th Cir. 1987)), *cert. denied*, 502 U.S. 994 (1991). In addition, the appellants must show that they suffered an injury resulting from the illegal conduct. *See Christofferson Dairy, Inc. v. MMM Sales, Inc.*, 849 F.2d 1168, 1172 (9th Cir. 1988). Taking these requirements in turn, and viewing the record in the light most favorable to the nonmoving parties, we conclude that the appellants failed to allege and show that the conduct complained of unreasonably restrained trade.

[2] It is undisputed that the agreement between Erbamont and CBVT constituted a vertical arrangement between a supplier and a distributor of doxorubicin. "Vertical arrangements are almost always judged by the rule of reason. Under the rule of reason approach, the plaintiff must show an injury to *competition*, rather than just an injury to plaintiff's business." *Id.* (emphasis in original; citations omitted). Put somewhat differently,

> [T]he factual support needed to show injury to competition must include proof of the relevant geographic and product markets and demonstrations of the restraint's anticompetitive effects within those

> markets. Avoiding such market analysis requires proof of actual detrimental competitive effects such as output decreases or price increases.

Les Shockley Racing, Inc. v. National Hot Rod Ass'n, 884 F.2d 504, 508 (9th Cir. 1989) (as amended; internal citations omitted).

The appellees contended below, and maintain on appeal, that the appellants did not meet their burden in opposing the motion for summary judgment because, *inter alia*, they failed to demonstrate an antitrust injury either to competition in general or to the appellants' business specifically. CBVT argued that the ability to market already finished doxorubicin produced by Erbamont would permit it to maintain customer goodwill and momentum while pursuing such approval. Agreeing with these contentions, the district court characterized CBVT's arrangement as being "pro-competitive," because (1) Erbamont's supply of doxorubicin enabled CBVT to remain in the market without any interruption in its business; (2) Sicor and Mercian remained free to try to sell their compound to other finisher-distributors in the United States; and (3) CBVT's arrangement with Erbamont had no apparent anticompetitive effect at the manufacturing level, and promoted (or at least did not discourage) competition downstream by preventing a reduction in the number of finisher-distributors in the American market.

[3] We agree. As a preliminary matter, it is apparent that CBVT's arrangement with Erbamont enabled it to

remain in the United States market and was thus procompetitive, notwithstanding Sicor's contention that CBVT did not lose that ability through any fault of Sicor's. Indeed, to hold as Sicor urges would result in a lessening of competition, since that would amount to a prohibition against CBVT's obtaining supplies of bulk doxorubicin elsewhere. Put another way, there was no harm to competition on account of the appellees' conduct, except for the Italian litigation which shut down Sicor's factory. Admittedly it hurt Farmitalia's would-be competitor, but Sicor had already been shut down by the Italian sequestration decree.

[4] Moreover, it is apparent from the materials before us that valid business reasons existed for CBVT's action, *i.e.*, CBVT's reason for buying from Farmitalia was to obtain the product, and Farmitalia's reason for selling that product to CBVT was to make money. In the absence of a showing of selling at a loss or similar conduct explainable only by a motive to reduce or eliminate competition, the appellants' claim is not persuasive.[8] *See High Tech. Careers v. San Jose Mercury News*, 996 F.2d 987, 990 (9th Cir. 1993) ("If there is a valid business reason for [the defendant's] conduct, there is no antitrust liability.").

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[8]/While it is true as a general proposition that the existence of valid business reasons motivating a monopolist's conduct is ordinarily a question of fact, *see High Tech. Careers v. San Jose Mercury News*, 996 F.2d 987, 990 (9th Cir. 1993), the absence of evidence to the contrary in the instant case is dispositive of this issue. *See also Matsushita*, 475 U.S. at 588 ("conduct as consistent with permissible competition as with illegal conspiracy does not, standing alone, support an inference of antitrust conspiracy").

Finally, the "technological complexities" argument advanced by the appellants in support of their contention that they faced insurmountable entry barriers to the American doxorubicin market is unconvincing. Such things constitute costs, obviously, but they are not barriers to market entry; indeed, the only barrier faced by Sicor prior to June 1988 was Farmitalia's patent. While the burden of FDA regulations might arguably constitute a barrier under some circumstances, the five-month delay argued by Sicor hardly rises to such a level.[9]

[5] As Justice Brandeis noted more than seventy-five years ago,

> Every agreement concerning trade, every regulation of trade, restrains. To bind, to restrain, is of their very essence. The true test of legality is whether the restraint imposed is such as merely regulates and perhaps thereby promotes competition or whether it is such as may suppress or even destroy competition.

Chicago Board of Trade v. United States, 246 U.S. 231, 238 (1918). Accordingly, and in light of the above, we con-

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[9]/Sicor's allegation that no other finisher-distributor would have been readily available to contract with Sicor or other potential foreign entrants into the American market at the supply level is arguably beside the point, for elimination of Sicor as a competitor would still leave the market essentially where it was before Sicor's entry, *viz.*, with two producers and three finisher-distributors.

clude that the district court did not err by granting summary judgment on the appellants' Section 1 claim.[10]

2. The Section 2 Claim

Under Section 2 of the Sherman Act, "[e]very person who shall monopolize, or attempt to monopolize, or combine or conspire . . . to monopolize any part of the trade or commerce among the several States . . . shall be deemed guilty of a felony[.] . . ." 15 U.S.C. § 2. A Section 2 monopolization claim requires proof of three things: First, that the Farmitalia Group possessed monopoly power in the relevant market; second, that the Farmitalia Group acquired or maintained that power willfully, rather than "'as a consequence of a superior product, business acumen or historical accident[,]'" *High Tech. Careers*, 996 F.2d at 989-90 (quoting *United States v. Grinnell Corp.*, 384 U.S. 563, 570-71 (1966)); and third,

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[10]/Because of our holding on this point, we need not reach the merits of the appellants' contention that the district court erred by ruling that Sicor, as a mere middleman, lacked standing to assert a claim under federal antitrust law. *But see Hanover Shoe, Inc. v. United Shoe Mach. Corp.*, 392 U.S. 481, 488-89 (1968) (rejecting defense in Clayton Act case that middleman, in being able to pass overcharge on to consumers, was not truly injured and thus lacked antitrust standing); *Yellow Pages Cost Consultants, Inc. v. GTE Directories Corp.*, 951 F.2d 1158, 1161 (9th Cir. 1991) (reversing denial of standing to advertising consultants earning commissions by serving as intermediary between advertisers and publishers), *cert. denied*, 112 S. Ct. 1947 (1992). With this said, however, we note that the district court did not base its holding on this conclusion, ruling instead that "the Court need not decide this issue because the Court GRANTS Erbamont's motion for partial summary judgment on the basis that there has been no proof of injury to competition."

that the appellants suffered a causal antitrust injury.[11] *See Christofferson Dairy*, 849 F.2d at 1174.

In keeping with these requirements, the appellants averred in their complaint that the appellees had succeeded in monopolizing the American market for doxorubicin; that this success arose from concerted unlawful actions, including unlawful interference with contractual relations between Sicor and Mercian, CBVT's breach of its supply and distribution agreements with Sicor and Alco, and CBVT's settlement of its antitrust action against the Farmitalia Group; and that the appellants suffered injury as a result.

[6] The district court granted summary judgment on the Section 2 claim for essentially the same reasons it rejected the appellants' Section 1 claim. Accordingly, affirmance is appropriate here as well. *See Williams v. I.B. Fischer Nevada*, 999 F.2d 445, 448 (9th Cir. 1993) (per curiam) (if conduct alleged in support of Section 1 claim is not deemed anticompetitive, same conduct alleged in support of Section 2 claim must also fail).

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[11]/A Section 2 claim of attempted monopolization, on the other hand, requires proof of four elements: "(1) specific intent to control prices or destroy competition; (2) predatory or anti-competitive conduct directed toward accomplishing that purpose; (3) a dangerous probability of success; and (4) causal antitrust injury." *McGlinchy v. Shell Chem. Co.*, 845 F.2d 802, 811 (9th Cir. 1988). As there was no showing of attempted monopolization on the part of the appellees, we will not further discuss this aspect of Section 2.

II. State Law Claims

A. Standard of Review

"Under California law, extrinsic evidence is admissible if relevant to prove a meaning to which the contractual language is reasonably susceptible." *Tamen v. Alhambra World Inv., Inc. (In re Tamen)*, 22 F.3d 199, 203 (9th Cir. 1994) (interpreting California law).[12] Where there is a dispute over a material fact deemed necessary to a contract's interpretation, based on evidentiary support for competing interpretations, summary judgment is inappropriate. *National Union Fire Ins. Co. v. Argonaut Ins. Co.*, 701 F.2d 95, 97 (9th Cir. 1983) (applying California law).

B. Discussion

1. Second Supply Agreement

[7] Sicor argues that CBVT breached the Second Supply Agreement by unilaterally terminating the contract without cause, notice, or providing an opportunity to cure. The district court rejected these contentions, based on its conclusion that no triable issue of fact existed on the question of a breach of the contract because the Second Supply Agreement required Sicor to supply doxorubicin to CBVT that had been manufactured exclusively by Sicor S.p.A. We disagree.

a. Cause for Termination

[8] While the Second Supply Agreement specifies that Sicor is to be the exclusive *seller* of bulk doxorubicin to be purchased and finished by CBVT in the United States, the contract is ambiguous as to whether or not Sicor is to be

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[12]/It is undisputed that California law governs the parties' claims.

the exclusive *manufacturer* of bulk doxorubicin sold thereunder. Section 1 of the Second Supply Agreement, for example, states that "SICOR agrees to sell Doxorubicin Hydrochloride conforming to the specifications set out in Appendix 1 to this Agreement . . . to CBVT on an exclusive basis." Neither section 1 nor Appendix 1 (i.e., the provisions defining the relevant product, bulk doxorubicin or "compound"), however, limits "compound" to doxorubicin manufactured by Sicor. Conformity with technical specifications, not manufacturing origin, are their exclusive focus.[13]

Under California law, a substantial quantum of inconsistency or ambiguity in a contract for the sale of goods is not a prerequisite to consideration of the parties' subse-

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[13]/We recognize, as did the district court, that section 5(a)(ii) of the Second Supply Agreement warrants in plain language that all compound sold under the agreement shall be "manufactured by Sicor S.p.A. in accordance with applicable manufacturing practice requirements." Further, we agree with the district court's conclusion that the warranty provisions in section 5(c) do not clearly support Sicor's interpretation of the contract. In that section Sicor warrants that "any COMPOUND which comes into its possession or control prior to delivery to CBVT shall not become in violation of the warranties and representations made in (a) and (b) at any time prior to the COMPOUND leaving its possession and control." The district court reasonably concluded that section 5(c) is inapplicable to shortfalls of the sort at issue here involving the quantity, as opposed to quality, of Sicor's deliveries.

While section 5(c) can be read to apply where a nonconforming shipment triggers Sicor's obligation under section 6(c) to use its best efforts to secure "Compound manufactured by an alternative manufacturer," sections 5(c) and 6(c) do not preclude Sicor from selling doxorubicin manufactured by a third party in other events, including production halts or shortfalls of the sort at issue here.

quent conduct. Under section 2202 of California's Commercial Code, terms of a contract involving the sale of goods "may be explained or supplemented . . . by course of performance." *Balfour, Guthrie & Co. v. Gourmet Farms*, 166 Cal. Rptr. 422, 426, 108 Cal. App. 3d 181, 187 (1980). More specifically, "any course of performance accepted or acquiesced in without objection shall be relevant to determine the meaning of the agreement," Cal. Com. Code § 2208(1), subject to the proviso that "express terms shall control course of performance[.]" Cal. Com. Code § 2208(2).

[9] The record contains substantial evidence that CBVT acquiesced in or even agreed to Sicor's efforts to secure an alternate supplier. Sicor showed that CBVT participated in discussions with Sicor and Mercian, culminating in at least an agreement in principle, regarding the latter's interest in becoming an alternate supplier. Where competing factual inferences are equally plausible regarding the intentions of the parties to an ambiguous contract, summary judgment is inappropriate. *See Miller v. Fairchild Indus., Inc.*, 797 F.2d 727, 735 (9th Cir. 1986). The circumstances surrounding Sicor's discussions with Mercian permit conflicting and equally plausible inferences regarding the proper interpretation of the Second Supply Agreement. Accordingly, summary judgment was inappropriate on this issue.

b. Notice and Opportunity to Cure

[10] In addition, Sicor's conduct following the closing of its plant in Italy appears to be consistent with the contractual provision intended by the parties to cover supply

failures of the sort involved here, *viz.*, the *force majeure* clause in section 7 of the Second Supply Agreement. Section 7 provides that "neither party shall be liable or be in breach of any provision of this Agreement if and to the extent that any failure or delay on its part to perform any obligation hereunder is because of force majeure or any other cause beyond the reasonable control of such party." Section 7 defines such causes to include, *inter alia*, "legal restraints or actions imposed by governmental authorities." Facially, this provision could embrace an injunction or sequestration order, the forms of restraint at issue here.

Section 7 obligates the party restrained by *force majeure* to "move to eliminate the effect thereof to the extent possible." A triable issue thus exists as to whether Sicor, by seeking alternate sources of supply, was acting in conformity with this requirement when CBVT entered into an exclusive arrangement with Erbamont. Section 7 obligates CBVT to accede to such efforts on the part of Sicor, if made "with all reasonable dispatch," for at least one month. In addition, section 8(c) of the Second Supply Agreement requires the parties to meet in the event the condition of *force majeure* persists for one month or longer. Section 8 further provides that if "no settlement is concluded within two additional months regarding future course of action," the party not claiming *force majeure* may terminate the agreement upon written notice to the other party.

The record indicates that Sicor did not receive proper notice of termination as required by section 8(c) until

CBVT's letter of April 10, 1991.[14] In this letter CBVT informed Sicor that CBVT would no longer do business with Sicor or Mercian, in keeping with its newly negotiated exclusive relationship with the Farmitalia Group. The record further indicates that, by that date Sicor and CBVT may have agreed, consistently with section 7, to an arrangement whereby third-party suppliers and CBVT's own inventory would cover CBVT's interim needs until CBVT received FDA approval as a finisher of Mercian-produced doxorubicin. Such an agreement would preclude CBVT from withdrawing from the Second Supply Agreement without liability by terminating with notice pursuant to section 8 or cancelling the contract without notice on the basis of impossibility, frustration of purpose or failure to deliver under section 2711 of California's Commercial Code.[15]

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[14]/Prior to this letter, the only communication from CBVT arguably resembling a notice of termination was a letter dated December 6, 1990, from Cetus Corporation to Alco, stating that "we will continue, independently of your efforts, to seek and qualify alternative sources of bulk." Under California law, "[w]hile a notice of termination or cancellation of a contract for breach need not be formal and explicit, it should clearly indicate to the defaulting party that the injured party considers the contract terminated." *Whitney Invest. Co. v. Westview Dev. Co.*, 78 Cal. Rptr. 302, 308, 273 Cal. App. 2d 594, 603 (1969). The December 6, 1990 letter did not indicate with the requisite degree of clarity that CBVT intended to terminate the Second Supply Agreement.

[15]/Section 2711 provides in relevant part that, "Where the seller fails to make delivery . . . the buyer may cancel," in addition to recovering damages for nondelivery and seeking specific performance or replevy. Cal. Com. Code § 2711(1)(b), (2)(b).

Viewed in the context of Sicor's contemporaneous discussions with Mercian and CBVT's representation that its inventory of doxorubicin was not in danger of depletion in the short term, Sicor and CBVT's ratification of the Second Supply Agreement on October 8, 1990, potentially constituted or contributed to an agreement on a future course of action whereby Sicor, pursuant to section 7(c), retained Mercian as an alternate supplier. Viewed in the light most favorable to Sicor, the record permits the inference that Sicor pursued such alternate sources of supply with the "reasonable dispatch" required by section 7, given that Sicor met with Pharmachemie, B.V. for this purpose within three weeks of the sequestration decree imposed by the Milan court on September 21, 1990, and then met with Mercian to the same end shortly thereafter.[16]

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[16]/A similar triable issue arises as to whether the parties settled on a "course of action" pursuant to section 7 by virtue of negotiations held between Mercian and Sicor in 1990 and 1991 with the knowledge, if not participation, of CBVT; a memorandum, dated February 22, 1991, circulated between the parties regarding various "marketing scenarios" and launch dates for CBVT's finishing and sale of Mercian-manufactured doxorubicin; and contemporaneous assurances from CBVT that Mercian would be an acceptable alternate manufacturer.

Sicor contends that "[n]ot only did Cetus representatives participate in these discussions [with Mercian], they agreed in principle to an arrangement under which Sicor would supply a minimum of 18 kgs of Mercian-manufactured doxorubicin over a three year period." This contention was disputed in the pleadings but was sufficiently founded on declarations submitted by Sicor. Accordingly, a material and unresolved issue persists regarding whether Sicor and CBVT met one month or more after the *force majeure* arose in accordance with sections 7 and 8(c) and, within two months thereof, settled upon a course of action from which CBVT unilaterally deviated in breach of

Finally, the district court held that "plaintiffs can prove no damages resulting from the alleged breach because they have been incapable of competing in the U.S. bulk doxorubicin market since September of 1990." We find insufficient support in the record for this conclusion. Sicor raised a triable issue of fact as to whether, absent CBVT's termination of the Second Supply Agreement, Sicor could have continued to compete, receive compensation and profit as an intermediary between third party manufacturers and CBVT, notwithstanding the injunction and sequestration order.

[11] In light of the above, and in view of the unresolved questions of fact noted, summary judgment on Sicor's breach of contract claim was improper.

2. Oral Agreement

[12] Sicor next contends that the district court erred in granting summary judgment to CBVT on Sicor's claim that CBVT breached its oral agreement, entered into simultaneously with the Second Amendment to the Distribution Agreement, to pursue antitrust claims against Erbamont in exchange for Alco's payment of one-half of CBVT's associated litigation costs. Under sections 2(b) and 17 of the Distribution Agreement (as added by the First Amendment and modified by the Second Amendment, respectively), the parties agreed to fund equally the costs of litigation in defense of CBVT's right to distribute doxorubicin purchased under the Second Supply Agreement. Section 17 sets forth various accounting provisions

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section 8(c).

and other terms governing this litigation fund. Sicor contends that the oral agreement modifies section 17 to require CBVT to pursue its antitrust claims against the Farmitalia Group with the utmost diligence, and that CBVT breached this contract in settling its claims against the Farmitalia Group.

The district court found that the integration clause set out in section 10 of the Distribution Agreement, which provides that "[v]ariations, alterations and additions to this Agreement shall only be deemed to have become part of this Agreement when it is specifically stated that it has [sic] become part of this Agreement and has [sic] been signed by both parties[,]" effectively precluded consideration of extrinsic evidence of CBVT's agreement to litigate its antitrust claims fully. We disagree.

[13] Although the parol evidence rule ordinarily precludes consideration of additional terms where an integrated written contract exists, *see* 1 B. Witkin, *Summary of California Law*, § 268 at 263 (9th ed. 1987), the rule is inapplicable here. Under California law, the parol evidence rule does not "render inadmissible proof of contemporaneous oral agreements collateral to, and not inconsistent with, a written contract where the latter is either incomplete or silent on the subject, and the circumstances justify an inference that it was not intended to constitute a final inclusive statement of the transaction." *Ellis v. Klaff*, 216 P.2d 15, 19, 96 Cal. App. 2d 471, 476 (1950). Accordingly, the parties' inclusion of an integration clause in the written contract is but one factor in this analysis. *See Enrico Farms, Inc. v. H.J. Heinz Co.*, 629

F.2d 1304, 1306 (9th Cir. 1980) (per curiam) (citing *Masterson v. Sine*, 436 P.2d 561, 65 Cal. Rptr. 545, 68 Cal. 2d 222 (1968)).

To determine whether a document is an integrated contract not susceptible to modification by parol evidence under California law, we must consider three additional factors: "the language and completeness of the written agreement[,] the terms of the alleged oral agreement and whether they contradict those in writing, [and] whether the oral agreement might naturally be made as a separate agreement[.]" *McLain v. Great Am. Ins. Cos.*, 256 Cal. Rptr. 863, 867, 208 Cal. App. 3d 1476, 1484 (1989) (quoting *Mobil Oil Corp. v. Rossi*, 187 Cal. Rptr. 845, 851-52, 138 Cal. App. 3d 256, 266 (1982)).

[14] As to the first additional factor, section 17 does not specify in substantial detail the full range of the parties' obligations to assist one another in defending CBVT's right to distribute doxorubicin in the American market. For example, while section 17 describes fully the mechanics of deposit, withdrawal, and reimbursement, it is silent as to such essential antecedent issues governing when, whether, and to what extent CBVT would be obligated to pursue litigation triggering these provisions. With regard to the second factor, the parol terms proffered by Sicor supplement rather than contradict the accounting provisions in section 17. As to the third factor, the parties might have been expected to reduce to writing an agreement regarding the manner and circumstances in which one would be obligated to pursue jointly funded and mutually beneficial litigation. Notwithstanding this

third factor and the integration clause, however, we conclude that on balance the factors set forth in *McLain* militate sufficiently in favor of considering the additional, parol terms to shield Sicor from summary judgment on its claim that CBVT breached their oral agreement.

The district court gave as an alternative ground for its ruling that, even assuming the existence of such an oral contract, CBVT's promise would be void as a matter of public policy. In doing so, the district court cited Sicor's allegation in the complaint that "CBVT breached the oral agreement by settling all pending litigation against FARMITALIA and ERBAMONT and by agreeing to procure its supply of doxorubicin directly from defendant FARMITALIA." The district court characterized this statement as a judicial admission that the oral agreement obligated CBVT to litigate fully to judgment, an agreement that ran afoul of California's public policy favoring settlement. *See Bush v. Superior Ct.*, 13 Cal. Rptr. 2d 382, 388, 10 Cal. App. 4th 1374, 1385 (1992).

The district court is correct that a statement in a complaint may serve as a judicial admission. *See American Title Ins. Co. v. Lacelaw Corp.*, 861 F.2d 224, 226 (1988); *Miller v. Lakeside Village Condominium Ass'n*, 2 Cal. Rptr. 2d 796, 803, 1 Cal. App. 4th 1611, 1623 (1991). Where, however, the party making an ostensible judicial admission explains the error in a subsequent pleading or by amendment, the trial court must accord the explanation due weight. *See Lacelaw*, 861 F.2d at 226 ("Factual assertions in pleadings and pretrial orders, *unless amended*, are considered judicial admissions conclusively binding

on the party who made them.") (emphasis added); *Hooper v. Romero*, 68 Cal. Rptr. 749, 753, 262 Cal. App. 2d 574, 580 (1968) (same). In opposing summary judgment, Sicor explained that, "By saying litigation to judgment, the parties did not mean that there would be no settlement[;]" rather, the parties intended only that CBVT would litigate its claims "fully and aggressively" and with Sicor's interests in mind.

[15] We conclude that Sicor retracted its judicial admission by subsequently recharacterizing the alleged oral agreement in its opposition to CBVT's motion for summary judgment. Accordingly, we must remand for consideration of whether the parties' oral agreement implicated the public policy invoked by the district court as an alternative ground in support of its erroneous grant of summary judgment on the oral contract claim.

3. Indebitatus Assumpsit

[16] The district court also rejected Sicor's claim seeking $ 500,000 in restitution to recover amounts Sicor alleged it had contributed to CBVT's litigation against Erbamont. Sicor argued that CBVT's settlement of the litigation with Erbamont was adverse to the appellants' interests and frustrated the purpose of their agreement to fund the litigation. The district court stated that the "claim of indebitatus assumpsit is entirely dependent on the claim of breach of the oral contract." Having ruled that the oral contract was unenforceable, the district court thus granted summary judgment to CBVT on Sicor's claim of indebitatus assumpsit. In light of our conclusion above that the district court should not have granted summary

judgment on Sicor's oral contract claim, the premise underlying the district court's ruling on the indebitatus assumpsit claim no longer exists. Accordingly, we must reverse and remand for reconsideration of this claim as well.

4. Intentional Interference With Contractual Relations and Prospective Business Advantage

Sicor's final contention is that CBVT intentionally interfered with Sicor's contractual and prospective business relations with Mercian by sending a letter to Mercian explaining that CBVT would no longer purchase doxorubicin from or through Sicor. Sicor argued that CBVT intervened with the intent to harm the appellants financially and to induce Mercian to breach its contract with them for the supply of doxorubicin. The district court granted summary judgment to CBVT on these two counts, ruling that, once Sicor was incapable of delivering Sicor-produced doxorubicin, CBVT was no longer under any contractual obligation to purchase bulk doxorubicin from the appellants, much less bulk doxorubicin manufactured by someone else.

[17] We agree with the district court that summary judgment was proper as to Count 6, Sicor's tortious interference with contractual relations claim. To recover for intentional interference with contractual relations under California law, a plaintiff must first show that it had a valid and existing contract. *Summit Mach. Tool Mfg. Corp. v. Victor CNC Sys.*, 7 F.3d 1434, 1442 (9th Cir. 1993) (interpreting California law). The record does not support Sicor's claim that negotiations with Mercian "were

successful and the final terms of a supply agreement were outlined and mutually agreed upon and confirmed between SICOR and Mercian in telefax letters dated November 9, 1990 and December 3, 1990."

[18] Because Sicor did not present these two letters to the district court, we decline to discuss the merits of Farmitalia Group's contention that the letters contained conflicting material terms precluding the existence of a contract; and, as Sicor presented only conclusory allegations concerning the existence of a contract with Mercian, we affirm the district court's dismissal of Count 6.[17] *See Angel v. Seattle-First Nat'l Bank*, 653 F.2d 1293, 1299 (9th Cir. 1981) ("A motion for summary judgment cannot be defeated by mere conclusory allegations unsupported by factual data.").

[19] In contrast, the district court's dismissal of Count 7, Sicor's claim for intentional interference with prospective economic relations, was error. The tort of intentional interference with prospective economic advantage extends liability to "'business relations or advantages which are merely prospective and ordinarily not the subject of an existing contract. The wrong consists of intentional and improper methods of diverting or taking business from another which are not within the privilege of fair competi-

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[17]/Sicor's failure to carry its burden of coming forth with some evidence to support its claim under Count 6 was not the basis for the district court's grant of summary judgment. Nevertheless, we may affirm a summary judgment on any ground finding support in the record, whether or not relied upon by the trial court. *Jewel Cos. v. Pay Less Drug Stores N.W., Inc.*, 741 F.2d 1555, 1564-65 (9th Cir. 1984).

tion.'" *Summit Mach. Tool*, 7 F.3d at 1442 (quoting 5 B. Witkin, *Summary of California Law*, § 652 at 740 (9th ed. 1988)). The otherwise similar elements of the two torts differ insofar as "'the existence of a legally binding contract is not a *sine qua non* to the maintenance of a suit based on the more inclusive wrong[,]'" *viz.*, interference with prospective economic advantage. 7 F.3d at 1442 (quoting *Buckaloo v. Johnson*, 537 P.2d 865, 869, 122 Cal. Rptr. 745, 749, 14 Cal. 3d 815, 823 (1975)).

[20] For purposes of opposing a Rule 56(c) motion, it is sufficiently evident from the record that Sicor and Mercian were engaged in serious negotiations promising to ripen from an agreement in principle into a binding contract. It is also apparent that CBVT was aware of, and perhaps active in, these negotiations. Sicor plausibly alleged that CBVT's letter to Mercian caused Mercian to break off the negotiations and resulted in injury to Sicor's business reputation, goodwill, and ability to compete in the American doxorubicin market. Therefore, we must reverse the district court's grant of summary judgment as to Count 7.

CONCLUSION

We affirm the district court's grant of summary judgment with respect to the Sherman Act claims, Counts 1 and 2, and as to the intentional interference with contractual relations claim, Count 6. We reverse the grant of summary judgment with respect to the remaining claims, set out in Counts 3, 4, 5, and 7, and remand for further proceedings.

AFFIRMED IN PART, REVERSED IN PART, AND REMANDED. Each side will bear its own costs on appeal.

**[FILED JAN 11 1993
RICHARD W. WIEKING
CLERK U.S. DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA]**

**IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA**

SICOR LTD., et al.	)	
	)	
Plaintiff,	)	
	)	Case No.
v.	)	C-91-1253-DLJ
	)	
CETUS CORP., et al.	)	ORDER
	)	
Defendants.	)	
	)	

On November 5, 1992, the Court heard arguments on defendant Cetus' motion for partial summary judgment on breach of contract claims, defendant Erbamont's motion for partial summary judgment on antitrust violations, and defendant Cetus' motion to strike portions of plaintiffs' declaration of Michael Cannon in opposition to Cetus' motion for summary judgment. Douglas Rigler and Daniel Press of Whitman & Ransom and Josef Cooper of Cooper and Kirkham appeared on behalf of plaintiff. Charles B. Cohler of Lasky, Haas, Cohler & Munter appeared for defendants the Cetus parties. Rollin Chippey of Brobeck, Phleger & Harrison, and David

Pritikin and Thomas Rein of Sidley & Austin appeared on behalf of defendants the Erbamont parties. Having considered the papers submitted, the applicable law, and the entire record herein, the Court hereby GRANTS defendant Cetus' motion for partial summary judgment on plaintiffs' breach of contract claims, GRANTS defendant Erbamont's motion for partial summary judgment on antitrust violation claims, and DECLINES to rule on defendant Cetus' motion to strike portions of plaintiffs' declaration of Michael Cannon in opposition to Cetus' motion for summary judgment.

BACKGROUND

I. Factual Background.

The factual background in this case is set forth in detail in the Court's April 16, 1992 Order. The following discussion therefore summarizes the facts most relevant to the motions now before the Court.

This case concerns the production and sale of doxorubicin hydrochloride ("doxorubicin"), the most widely sold anti-cancer drug in the United States. Doxorubicin can be used against 14 different types of cancer, making it one of the most effective anti-cancer drugs available. Sales of doxorubicin in the United States exceeded $100 million in 1988, 20% of the total sales of anti-tumor drugs in the United States.

Defendant Farmitalia Carlo Erba, S.r.l. ("Farmitalia"), an Italian corporation, originally developed the techniques necessary to produce doxorubicin in commercial quantities. It held the U.S. patent on the

production of doxorubicin until June 1988 and held related patents on certain production processes until April 9, 1991. However, Farmitalia has never sought patent protection on much of its production techniques. Instead it has attempted to retain its doxorubicin production techniques as trade secrets. Through 1988, Farmitalia and its related companies, Erbamont N.V. and Erbamont, Inc. (the "Erbamont Parties") were the only suppliers of doxorubicin to the United States market, which they sold under the name of Adriamycin.

Sometime prior to 1988, however, Sicor, S.p.A., an Italian corporation, also began to produce doxorubicin outside Milan, Italy, for sale in the United States. Around 1988, Sicor, Ltd. ("Sicor"), a wholly-owned British subsidiary of Sicor, S.p.A., entered into a contract with Cetus-Ben Venue Therapeutics ("CBVT"), an American drug retailer.[1] Under this agreement, Sicor agreed to supply CBVT with all of its doxorubicin needs from Sicor's Milan facility for three years, with Alco Chemicals, Ltd. serving as the distributor.

In 1988, Farmitalia filed an action with the United States International Trade Commission ("ITC") seeking to enjoin Sicor's importation of doxorubicin based on alleged patent infringement. The ITC ruled against Farmitalia on the claim.

[1/] CBVT is related to Cetus Corp., Cetus Generic Corp., Ben Venue Laboratories, Inc., and Ben Venue Generic, Inc. All references to CBVT include Cetus and Ben Venue.

In April 1989, CBVT filed an action against Farmitalia and Erbamont, Inc., alleging that they had engaged in unfair competitive practices and had violated antitrust laws in the sale and distribution of doxorubicin. CBVT was actively supported by Sicor and Alco Chemicals, with Alco Chemicals allegedly agreeing to pay half of the litigation costs and Sicor agreeing to set up a fund out of which a potential damage judgment would be paid.

Sicor lost control of its Italian production facilities in 1988, and thereafter entered into negotiations with the Mercian Corp. ("Mercian"), a Japanese drug manufacturing corporation, to supply CBVT with doxorubicin. Late in 1990, Sicor and Mercian concluded a supply agreement under which Mercian would supply doxorubicin pursuant to Sicor's agreement with CBVT.

CBVT, on the other hand, apparently concerned that its doxorubicin supply was not secure, soon entered into settlement negotiations with Farmitalia. In April 1991, CBVT announced that it had settled its action with Farmitalia and had entered into an agreement with Farmitalia wherein Farmitalia would exclusively supply CBVT with its doxorubicin needs. By so doing, CBVT refused to buy any more doxorubicin from either Sicor or Mercian pursuant to those supply agreements.

On April 25, 1991, plaintiffs filed this action. Sicor and Alco Chemicals claim that Farmitalia, CBVT, and their related corporations violated the Sherman Antitrust Act by shutting Sicor out of the doxorubicin supply

market. Sicor and Alco Chemicals also claim breach of contract, interference with contract, and list a cause of action for indebitatus assumpsit. They seek damages and injunctive relief. Defendants now move the Court for summary judgment on these claims.

II. Legal Standard.

Rule 56 governs motions for summary judgment. This rule states that summary judgment may be granted when "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(e).

In a motion for summary judgment, "[i]f the party moving for summary judgment meets its initial burden of identifying for the court those portions of the materials on file that it believes demonstrates the absence of any genuine issues of material fact," the burden of production then shifts so that "the nonmoving party must set forth, by affidavit or as otherwise provided in Rule 56, 'specific facts showing that there is a genuine issue for trial.'" T.W. Electric Service, Inc. v. Pacific Elec. Contractors Ass'n, 809 F.2d 626, 630 (9th Cir. 1987) (citing Celotex Corp. v. Catrett, 106 S. Ct. 2548, 2553 (1983); Kaiser Cement Corp. v. Fischbach & Moore, Inc., 793 F.2d 1100, 1103-04 (9th Cir.), cert. denied, 107 S. Ct. 435 (1986)) (emphasis in original).

On cross motions for summary judgment, the burdens faced by the opposing parties vary with the

burden of proof they will face at trial. To succeed on summary judgment plaintiff must prove each element essential of the claims upon which it seeks judgment by undisputed facts. Fontenot v. Upjohn Co., 780 F.2d 1190, 1194 (5th Cir. 1986) (party with burden "must establish beyond peradventure all of the essential elements . . ." (emphasis original)). In an influential article, Judge Schwarzer has phrased plaintiff's as follow: "Where the moving party has the burden [of proof at trial . . .,] his showing must be sufficient for the court to hold that no reasonable trier of fact could find other than for the moving party." Schwarzer, Summary Judgment Under the Federal Rules: Defining Genuine Issues of Material Fact, 99 F.R.D. 465, 487-488 (1984).

In contrast, defendant' motion for summary judgment faces a lighter burden. Because the defendant does not bear the burden of proof at trial, the defendant need only point to the insufficiency of the plaintiff's evidence to shift the burden to the plaintiff to raise genuine issues of fact as to each claim by substantial evidence. T.W. Electric Service, Inc. v. Pacific Elec. Contractors Assoc., 809 F.2d 626, 630 (9th Cir. 1987) citing Celotex Corp. v. Catrett, 106 S. Ct. 2548, 2553 (1983); Kaiser Cement Corp. v. Fischbach & Moore, Inc., 793 F.2d 1100, 1103-04 (9th Cir.), cert. denied, 479 U.S. 949 (1986). If plaintiff fails to raise a genuine issues of fact, then summary adjudication in favor of the defendant will be granted.

When considering the evidence in a summary judgment motion, the Court does not make credibility

determinations or weigh conflicting evidence, and is required to draw all inferences in a light most favorable to the non-moving party. T.W. Electric, 809 F.2d at 630-31 (citing Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 106 S. Ct. 1348, 1356 (1986)); Ting v. United States, 927 F.2d 1504, 1509 (9th Cir. 1991). Regardless of who is the moving party, each party must "establish the existence of the elements essential to [its] case, and on which [it] will bear the burden of proof at trial." Celotex Corp., 106 S. Ct. at 2552. The standard for deciding a motion for summary judgment is the same standard used to decide a motion for a directed verdict: "whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law." Anderson v. Liberty Lobby, Inc., 106 S. Ct. 2505, 2512 (1986).

In meeting their burdens of proof, each party must come forward with admissible evidence. Fed. R. Civ. P. 56(e). Conclusory, speculative testimony in affidavits and moving papers is insufficient to raise genuine issues of fact and defeat summary judgment. See Falls Riverway Realty, Inc. v. Niagara Falls, 754 F.2d 49 (2d Cir. 1985); Thornhill Publishing Co. v. GTE Corp., 594 F.2d 730, 738 (9th Cir. 1979). Hearsay statements found in affidavits are inadmissible. See, e.g., Fong v. American Airlines, Inc., 626 F.2d 759, 762-63 (9th Cir. 1980). Plaintiffs must ultimately persuade the Court in opposing summary judgment that they will have sufficient admissible evidence to justify going to trial.

DISCUSSION
DEFENDANT CETUS' MOTION FOR SUMMARY JUDGMENT

I. Sicor's Breach of Contract Claim.

Defendants argue that plaintiffs' claim that CBVT breached the Supply Agreement by contracting with Erbamont to obtain bulk doxorubicin can be decided as a matter of law because the contract was already terminated by plaintiffs' prior material breach. According to defendants, plaintiffs materially breached the Agreement by becoming and remaining incapable of supplying CBVT with bulk doxorubicin manufactured by Sicor, S.p.A.

Sicor breached the contract because the Agreement required Sicor to supply doxorubicin manufactured exclusively by Sicor, S.p.A. to CBVT. Defendants cite paragraph 16 of the Complaint to support this proposition:

> Under the Supply Agreement, . . . [t]he actual manufacturer of the compound was agreed to be Sicor, S.p.A. whose production facility is located in Italy.

When the Sicor, S.p.A. doxorubicin manufacturing plant was shut down by the Italian government in September of 1990, plaintiffs became incapable of delivering the bulk doxorubicin manufactured by Sicor, S.p.A., and therefore breached the agreement.

Since plaintiffs had already breached the agreement, CBVT was excused from its obligations to plaintiffs under the then void agreement, and was therefore entitled to contract with Erbamont for an

alternate source of bulk doxorubicin. As the court in Lanvin, Inc. v. Colonia, Inc., 739 F. Supp. 182, 195 (S.D.N.Y. 1990), held: "[a] party may unilaterally terminate a contract where the other party has breached and the breach is material."

The Court agrees that Sicor materially breached the exclusivity provision of the Agreement when it became incapable of supplying doxorubicin manufactured in its Italian facility.[2]

Sicor argues that the language defendants cite, supporting their contention that only Sicor, S.p.A. doxorubicin was permitted, is limited to the quality of the compound in the warranty provisions of the Agreement. It was not meant to imply, and in no way suggests, that Sicor, S.p.A. was required to be the sole manufacturer of doxorubicin. Sicor's Opposition Brief at 8-10.

Contrary to Sicor's contention, the Court finds that the language of the Supply Agreement clearly states that Sicor, S.p.A. is to be the sole manufacturer under the Agreement:

2/ Sicor responds that it never breached the Agreement because it filled every purchase order for doxorubicin that CBVT requested as required by the Agreement. Plaintiffs' Opposition Brief at 6. CBVT argued and the Court agrees that CBVT should not be required to carry on a "futile charade of placing orders that everyone knew could not be met," when Sicor, S.p.A. was shut down. "The law neither does nor requires idle acts." Cal. Civ. Code § 3531 (West 1970). It was clear that Sicor was no longer able to manufacture doxorubicin with the closing of the Sicor, S.p.A. plant by the Italian authorities. Since CBVT was contractually obligated to purchase Sicor-manufactured doxorubicin only, CBVT should not have been required to place futile orders with Sicor for doxorubicin.

> All the COMPOUND sold under this Agreement is hereby warranted by SICOR as of the date of such shipment or delivery to be, on such date . . . (ii) manufactured by SICOR, S.p.A. in accordance with applicable manufacturing requirements.

Supply Agreement, ¶ 5(a) (emphasis added).

Plaintiffs' attempt to read paragraph 6(c) of the Supply Agreement as relieving Sicor, S.p.A. of its role as the exclusive manufacturer of doxorubicin untenable. Paragraph 6(c) of the Agreement states:

> If any failure by SICOR to supply COMPOUND that is in conformity with SPECIFICATIONS results in an inability of CBVT to meet customer demand . . ., then SICOR shall use its best efforts to assist CBVT by securing supply, on the same terms as set forth in this Agreement, of Compound manufactured by an alternative manufacturer which is reasonably acceptable to CBVT and is in possession of the requisite approval by the FDA . . . .

Supply Agreement, ¶ 6(c) (emphasis added).

In the face of the express language in paragraph 5(a), paragraph 6(c) is clearly limited to circumstances where plaintiffs might have supplied Sicor, S.p.A. bulk doxorubicin, but the doxorubicin technically failed to meet the stated specifications. Paragraph 6(c), authorizing the sale of doxorubicin from another manufacturer in limited situations, was clearly not intended to apply where

plaintiffs have become entirely incapable of delivering any doxorubicin manufactured by Sicor, S.p.A.

Accordingly, the Court finds that the express language of the Agreement indicates that Sicor materially breached the exclusivity provision prior to CBVT's contract with Farmitalia for bulk doxorubicin. CBVT's motion for partial summary judgment on the alleged breach of the Agreement is therefore GRANTED.

II. Sicor's Breach of Oral Contract to Litigate Claim.

Defendants next request the Court to grant their motion for summary judgment on plaintiffs' claim of breach an oral contract to litigate. Defendants argue (1) the parol evidence rule precludes evidence of an oral contract, (2) any such oral contract, even if proven, would be unenforceable as against public policy, and (3) plaintiffs could not recover from any alleged breach of an oral contact anyway because it suffered no damages.

The oral contract in dispute is alleged in the Complaint, which states:

> On or about April 10, 1989, plaintiffs and defendant CBVT entered into an oral agreement whereby plaintiffs agreed to contribute fifty percent (50%) of the legal fees and expenses incurred by CBVT in its anti-trust/unfair competition litigation against FARMITALIA and ERBAMONT. In return, CBVT agreed to fully litigate to judgment its anti-trust and unfair competition claims determining that FARMITALIA and ERBAMONT unlawfully protected a monopoly position

> with respect to the distribution and sale of doxorubicin in the U.S.

Complaint at ¶ 57 (emphasis added).

Defendants argue that no such oral contract was ever made, and if it was made, the parol evidence rule would bar evidence of such an oral agreement in the face of the written amendment to the distribution agreement entered into between the parties the very same day of the alleged oral agreement.[3]

Specifically, defendants contend that on the same day plaintiffs allege the oral contract was made, the parties entered into "an expressly integrated written contract with respect to the identical subject matter for the identical consideration which makes no mention of any such [oral] agreement," Defendants' Motion for Summary Judgment Brief at 19. It would have been unnatural for the parties to enter into a separate oral agreement without at least referencing the oral contract in the written agreement. The explicit integration clause in the written contract states that the Agreement

> together [with] the Supply Agreement, sets forth the entire understanding and agreement of the parties as to its subject matter and supersedes and replaces any and all prior negotiations, discussions or

---

3/ The parole evidence rule states that where a written agreement exists, proof of a collateral oral agreement is permitted only if it "is such an agreement as might naturally be made as a separate agreement by parties situated as were the parties to the written contract." Masterson v. Sine, 68 C.2d 222, 227-28 (1968) (emphasis original).

agreements of the parties as to such subject matter, oral or written."

¶ 10 of the Distribution Agreement (emphasis added).

In response, plaintiffs argue that in determining whether a contract is fully integrated, the Court must look at whether the parties intended the writing to serve as the exclusive embodiment of their agreement. Masterson, 68 C.2d at 225. They claim that only part of the April 10, 1989 amendment to the Distribution Agreement was intended to be integrated. With respect to the terms of the agreement to litigate, no integration was intended. Plaintiff argues that it was natural for the parties to include only financial terms in the written agreement and to keep the other terms regarding cooperating in the litigation oral for ease of future modification.

The Court finds that plaintiffs have failed to present sufficient evidence in support of this argument. There is no evidence that the portion of the April 10, 1989 amendment to the Distribution Agreement dealing with financial terms was intended to be integrated, while the portion dealing with the agreement to litigate was not intended to be integrated. Absent ambiguity, the express integration clause in paragraph 10 of the Distribution Agreement governs. See Gruen Watch Co. v. Artists Alliance, 191 F.2d 700 (9th Cir. 1951) (Under California law, provisions of a contract as written govern construction thereof, in the absence of ambiguity.); Levi Strauss & Co. v. Aetna Cas. and Sur. Co., 237 Cal. Rptr. 473 (1986) (In construing a contract, the trial court's function is to ascertain and declare what is contained in the contract, and not to insert what has been omitted or what one of the parties now wishes were there.).

Even if evidence of the oral contract were permissible, defendants claim any such oral agreement would have been unenforceable as against public policy. There is a strong public policy in favor of settling cases and against litigating them. Hamilton v. Oakland School Dist., 219 Cal. 322, 329 (1933); Skulnick v. Roberts Express, Inc., 2 C.A.4th 884, 891 (1992); Stambaugh v. Superior Court, 62 C.A.3d 231, 236 (1976). In this case, the alleged oral agreement was "to fully litigate to judgment its anti-trust and unfair competition claims," Complaint at ¶ 57, against FARMITALIA and ERBAMONT in favor of attempting to settle the litigation.

In response, plaintiffs argue that the litigation agreement is not void as against public policy because it discourages settlement. The litigation agreement merely states that the parties were to "fully litigate to judgment" the antitrust claims so that both CBVT and the Sicor Parties could fairly compete in the U.S. doxorubicin market. It does not mean that there should be no settlement, but rather that the claims were to be litigated fully and aggressively in order to secure the stated goals for both CBVT and the Sicor parties, either by settlement or by trial. As plaintiffs explain, "CBVT's obligation was not to litigate without settling, but simply to consider Sicor and Alco's interests and cooperate with them in settling the litigation." Plaintiffs' Opposition Brief at 20.

The Court finds plaintiffs' attempts to construe the language of the oral agreement unconvincing. Defendants correctly point out that Sicor has recharacterized the oral agreement in terms inconsistent with the terms alleged in the original complaint. Paragraph 59 of the Complaint states:

> [O]n or about April 12, 1991, defendant CBVT breached the oral agreement by settling all pending litigation against FARMITALIA and ERBAMONT and by agreeing to procure its supply of doxorubicin directly from defendant FARMITALIA. (emphasis added)

Plaintiffs' original language in the Complaint is clearly at odds with Sicor's claims in its Opposition Brief. Thus, even if the alleged oral contract could be proven, it must be interpreted by plaintiffs' own admission as a contract to "fully litigate to judgment," which would be void as against public policy. To the extent that plaintiffs intended for the alleged contract to be an agreement "not to litigate without settling, but simply to consider Sicor and Alco's interests and cooperate with them in settling the litigation," the Court finds that plaintiffs' unarticulated and contradictory intentions to be uncontrolling.

Finally, defendants argue that an essential element in any claim for breach of contract is proof of damages resulting from the breach. In this case, plaintiffs can prove no damages from the alleged breach because they have been incapable of competing in the U.S. bulk doxorubicin market since September of 1990. The Sicor, S.p.A. plant was shut down by the Italian government well before CBVT settled its litigation with Erbamont; thus, Sicor could not have suffered any lost profits since it couldn't even manufacture or sell any doxorubicin.

In response, Sicor states that it has been damaged by Cetus' breach of the Agreement because had the litigation between Cetus and Erbamont resulted in a judgment against Erbamont, Erbamont's monopoly of the

U.S. doxorubicin market would have been broken up, Sicor may have been allowed to reopen its production plant, and Sicor would have been able to fully compete in the market.

The Court finds this chain of assumptions too speculative to be persuasive. Plaintiffs argue that:

> Had . . . [the anti-trust/unfair competition litigation] been tried before a trier of fact, it is more likely than not that said adjudication would have allowed CBVT to compete in the U.S. doxorubicin market. Plaintiffs would have directly benefitted from a decision in favor of CBVT because plaintiffs had an exclusive distribution and supply relationship with CBVT and because plaintiff's independent right to participate in the United States doxorubicin market would have been assured. Complaint at 15, ¶ 57 (emphasis added).

The Court finds that Sicor has failed to meet its burden of proof in raising a genuine issue of material fact with respect to this alleged breach of an oral contract to litigate. Accordingly, defendants Cetus' motion for partial summary judgment on Sicor's claim for breach of an oral contact to litigate is GRANTED.

III. Sicor's Indebitatus Assumpsit Claim.

Defendants next argue that Sicor's claim for "indebitatus assumpsit" can be decided as a matter of law because it is dependent on the existence of the alleged oral agreement, which defendants have previously argued is non-existent, unprovable, and/or unenforceable.

Plaintiffs seek $500,000 in restitution to recover the amount they allegedly paid to CBVT to support the litigation against Erbamont. They argue the express terms of the April 1989 Distribution Agreement Amendment require CBVT to use the funds for litigation costs. The money was not used for these expenses because the case settled, and CBVT has not returned the unspent funds. CBVT was therefore unjustly enriched.

> The Cetus parties settlement of the litigation with Erbamont in a manner adverse to the interest of the Plaintiffs clearly frustrated the purpose of the agreement to fund the litigation, which was to benefit Plaintiffs by requiring Erbamont to cease its anticompetitive actions.

Plaintiffs' Opposition Brief at 22.

Plaintiffs claim of indebitatus assumpsit is entirely dependent on its claim of breach of the oral contract discussed above. Since the Court held, supra, that plaintiffs have not sufficiently established the elements necessary to seek relief under a claim of breach of oral contract, they have also failed to meet their burden on their claim of indebitatus assumpsit. As defendants explain, "In the absence of an enforceable agreement that CBVT would use plaintiffs' contribution to fully litigate and not settle, there can be no finding that CBVT used the funds provided by plaintiffs for anything other than their intended purpose." Cetus' Motion for Summary Judgment Brief at 21. Defendants' motion for partial summary judgment on the issue of indebitatus assumpsit is therefore GRANTED.

IV. Intentional Interference with Contractual and Prospective Economic Relations.

According to defendants, Sicor's claim of intentional interference with contractual and prospective economic relations is also ripe for summary adjudication. The claim alleges that defendants intentionally interfered with contractual and prospective economic relations by failing to accept bulk doxorubicin arrangement from Mercian through Sicor.

CBVT responds and the Court agrees that CBVT is not and was never a party to a contract in which it was obligated to accept the proposed doxorubicin supply arrangement with Sicor and Mercian. Indeed, once Sicor became incapable of delivering Sicor, S.p.A. doxorubicin, CBVT was no longer contractually obligated to purchase any bulk doxorubicin from plaintiffs, much less bulk doxorubicin manufactured by someone other than Sicor, S.p.A.. CBVT was entirely free to enter into a contractual relationship with whomever it wished.

Plaintiffs dispute CBVT's contention that CBVT was under no obligation to accept non-Sicor, S.p.A. bulk doxorubicin from Sicor. According to Sicor, CBVT was obligated to accept doxorubicin from manufacturers other than Sicor, S.p.A. under the Agreement. The contract states that under certain conditions, Sicor may obtain bulk doxorubicin from alternative suppliers. This argument was addressed in this Order in Section I, supra, and the Court has held that the contract was an exclusive agreement in which CBVT was obligated to accept only Sicor, S.p.A.-manufactured doxorubicin. CBVT was never obligated to accept Mercian-manufactured doxorubicin. Accordingly, the Court GRANTS defendants' motion for partial summary judgment with respect to the claim of

intentional interference with contractual and prospective economic relations.

DEFENDANT ERBAMONT'S MOTION FOR SUMMARY JUDGMENT

Plaintiffs allege in their Complaint that defendants have violated sections 1 and 2 of the Sherman Act, 15 U.S.C. §§ 1 and 2. Specifically, they claim defendants "have acted with specific intent and purpose to monopolize and have in fact monopolized the market for doxorubicin in the United States" by:

> a. . . . act[ing] to breach their supply and distribution agreements with plaintiffs thereby excluding plaintiffs from the bulk doxorubicin market in the United States;
>
> b. . . . act[ing] to interfere with plaintiffs' contractual relations with Mercian thereby depriving plaintiffs of the only alternative source of doxorubicin for the United States, and thereby excluding plaintiffs from the bulk doxorubicin market in the United States;
>
> c. . . . reach[ing] agreement to dismiss the antitrust action pending before this court and hav[ing] agreed to combine and contract together to exclude other competitors including plaintiffs from the bulk doxorubicin market in the United States.

Complaint at 10, ¶¶ 40-42. The Complaint goes on to state that the above acts were "intentionally and maliciously done for the express purpose of destroying the

business of plaintiffs and eliminating plaintiffs as competitors." Id. at 43. See generally Complaint at 10-13.

Defendant Erbamont brings this motion for summary judgment on the grounds that plaintiffs have no standing to allege these antitrust violations because (1) there is no injury to competition and (2) their alleged injuries are not antitrust injuries. For purposes of this motion, the parties agree the relevant market is the United States doxorubicin market and the plaintiffs' injuries are the lost profits from the terminated agreement between plaintiffs and defendants Cetus parties.

Erbamont argues and the Court agrees that there is no injury to competition in this case. In fact, Erbamont's supply of doxorubicin to CBVT was pro-competitive because Erbamont's stable supply of doxorubicin enabled CBVT to remain in the market without any interruption in its business. The presence of an additional competitor, thus increased competition in the U.S. doxorubicin market. In addition, neither Mercian nor Sicor was ever blocked from selling bulk doxorubicin in the United States; both parties were free at all times to try to sell the compound to another finisher and distributor of the drug. As the court in McGlinchy v. Shell Chemical Co., 845 F.2d 802, 812 (9th Cir. 1988), held, for the proposition that economic injury to a competitor does not equal injury to competition.

Erbamont next argues that plaintiffs injuries are not "antitrust injuries," i.e., they do not flow from that which would make defendants' acts unlawful under the antitrust laws. Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc., 429 U.S. 477, 489 (1977) ("Plaintiffs must prove antitrust injury, which is to say injury of the type the

antitrust laws were intended to prevent and that flows from that which makes defendants' acts unlawful . . . . It should, in short, be 'the type of loss that the claimed violations . . . would be likely to cause.'" (citation omitted)) (emphasis added); see also Atlantic Richfield Co. v. USA Petroleum Co., 495 U.S. 328, 342-44 (1990) (antitrust injury requirement ensures that plaintiff can recover only if his loss stems from competition-reducing aspect or effect of defendant's behavior).

Specifically, Erbamont argues that plaintiffs have merely lost profits as middlemen who match doxorubicin suppliers, like Sicor, S.p.A. and Mercian, with doxorubicin finishers and distributors, like Cetus, and such lost profits do not constitute antitrust injury, especially when the loss is of "but one account." Larry R. George Sales Co. v. Cool Attic Corp., 587 F.2d 266, 274-75 (5th Cir. 1979); see also Havoco of America, Ltd. v. Shell Oil Co., 626 F.2d 549, 558 (7th Cir. 1980) ("[A] loss by the plaintiff of a single contract with a single purchaser is simply not equivalent to a deleterious effect on the market. . . . [T]here must be some allegation of a harmful effect on a more generalized market . . .).

The Court finds that to the extent the alleged injury to competition is the loss profits of a middleman, no injury protectable under the antitrust laws has been established. See HyPoint Technology, Inc. v. Hewlett-Packard Co., 949 F.2d 874, 878 (6th Cir. 1991). However, the Court need not decide this issue because the Court GRANTS Erbamont's motion for partial summary judgment on the basis that there has been no proof of injury to competition.

DEFENDANT CETUS' MOTION TO STRIKE

Defendant Cetus also brings a motion to strike portions of the declaration of Michael Cannon in plaintiffs' opposition to Cetus' motion for summary judgment ("the Cannon declaration"). Specifically, defendant argues that portions of the Cannon declaration are conclusory and argumentative. In addition, defendant argues that the declaration submitted by plaintiff is improper under the Federal Rules of Civil Procedure.

The Federal Rule of Civil Procedure 12(f) provides that "the court may order stricken from any pleading any insufficient defense or any redundant, immaterial, impertinent, or scandalous matter." Rule 56(e) requires that affidavits include only facts that would be admissible in evidence. 10A Wright, Miller, and Kane, Federal Practice and Procedure § 2738, at 474 (1983) (hereinafter "Wright and Miller") ("Because the policy of Rule 56(e) is that the judge should consider any material that would be admissible at trial, the rules of evidence and the exceptions thereto determine what averments the affidavit may contain.").

Generally, any doubts as to the quality of the materials submitted in support of a summary judgment motion are resolved against the moving party. Wright and Miller, § 2738, at 438. See also Lew v. Kona Hospital, 754 F.2d 1420 (9th Cir. 1985) ("[A]s a general principle, we treat the opposing party's papers more indulgently than the moving party's papers. Doff v. Brunswick Corp., 372 F.2d 801, 804 (9th Cir. 1966) (referring to the "rule of liberal construction of a counter affiant's papers")).

The Court has considered defendant Cetus' motion to strike in so far as it affects the foregoing motions. The

Court finds that it is unnecessary to decide this issue and accordingly DECLINES to rule on Cetus' motion to strike.

CONCLUSIONS

For the foregoing reasons, the Court ORDERS as follows:

1. Cetus' motion for partial summary judgment on plaintiffs' claim for breach of the written Agreement is GRANTED.

2. Cetus' motion for partial summary judgment on plaintiffs' claim for breach of the oral contract to litigate is GRANTED.

3. Cetus' motion for partial summary judgment on plaintiffs' claim of indebitatus assumpsit is GRANTED.

4. Cetus' motion for partial summary judgment on plaintiffs' claim of intentional interference with contractual and prospective economic relations is GRANTED.

5. Erbamont's motion for partial summary judgment on alleged violations of 15 U.S.C. §§ 1 and 2 is GRANTED.

6. The Court declines to rule on Cetus' motion to strike portions of the declaration of Michael Cannon in plaintiffs' opposition to Cetus' motion for summary judgment.

7. Defendants shall prepare and file a proposed form of judgment within 30 days of the date of this Order. Plaintiffs shall have 30 days to file an opposition to the proposed judgment. The Court will then consider the proposal and any opposition and issue a final judgment in this case.

IT IS SO ORDERED.

Dated: January 11, 1993

//S//
D. Lowell Jensen
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

SICOR LIMITED and ALCO CHEMICALS, LTD., Plaintiffs, v. CETUS CORPORATION; CETUS GENERIC CORPORATION; BEN VENUE LABORATORIES, INC.; BEN VENUE GENERIC CORPORATION; CETUS-BEN VENUE THERAPEUTICS; ERBAMONT N.V.; ERBAMONT, INC.; and FARMITALIA CARLO ERBA S.r.l., Defendants.	**[FILED MAR 12 1993 RICHARD W. WIEKING, CLERK]** Civil Action No. C-91-1253-DLJ
ERBAMONT INC. and FARMITALIA, CARLO ERBA S.r.l. Counterplaintiffs, v. SICOR LIMITED; ALCO CHEMICALS, LTD. and SICOR S.p.A., Counterdefendants.	FINAL JUDGMENT OF DISMISSAL OF PLAINTIFFS' CLAIMS **[ENTERED IN CIVIL DOCKET MAR 19, 1993]** Hon. D. Lowell Jensen

The Motions for Summary Judgment of Dismissal of the Complaint by Erbamont N.V., Erbamont, Inc., and Farmitalia Carlo Erba S.r.l. (hereinafter referred to collectively as "the Erbamont Parties") and by Cetus Corporation, Cetus Generic Corporation, Ben Venue Laboratories, Inc., Ben Venue Generic Corporation, and Cetus-Ben Venue Therapeutics (hereinafter referred to collectively as "the Cetus Parties"), including the Cetus Parties' express joinder in the companion motion by the Erbamont Parties, having been served and filed on July 14, 1992, the motions having been fully briefed and having come on for hearing before the Honorable D. Lowell Jensen, United States District Judge, on November 5, 1992, and having then been submitted, and the Court being fully advised in the premises.

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that each such motion is granted in full and the complaint is dismissed as against all defendants;

IT IS FURTHER ORDERED, the Court expressly finding that there is no just reason for delay, that pursuant to Fed. R. Civ. P. Rule 54(b), the Clerk shall enter this judgment as a final judgment as to all claims of the Plaintiffs against the Defendants.

IT IS SO ORDERED, this 12th day of March, 1995.

//S//
D. Lowell Jensen
United States District Judge

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IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

SICOR LIMITED and ALCO CHEMICALS, LTD., Plaintiffs, v. CETUS CORPORATION; CETUS GENERIC CORPORATION; BEN VENUE LABORATORIES, INC.; BEN VENUE GENERIC CORPORATION; CETUS-BEN VENUE THERAPEUTICS; ERBAMONT N.V.; ERBAMONT, INC.; and	* CIVIL ACTION * NO. C-91- * 1253-DJL * * (FILED UNDER * SEAL) * * DECLARATION * OF DOUGLAS V. * RIGLER IN * OPPOSITION TO * THE ERBAMONT * PARTIES'

FARMITALIA CARLO ERBA S.r.l., Defendants.	* MOTION FOR SUMMARY JUDGMENT
ERBAMONT INC. and FARMITALIA, CARLO ERBA S.r.l. Counterplaintiffs, v. SICOR LIMITED; ALCO CHEMICALS, LTD. and SICOR S.p.A., Counterdefendants.	* DATE: September 30, 1992 * TIME: 10:00 am * PLACE: Court-room 3

I, Douglas V. Rigler, declare as follows:

1. I am an attorney licensed to practice in the District of Columbia and am a partner in the law firm of Whitman & Ransom, counsel of record for the Sicor Parties in this litigation. I have personal knowledge of the facts stated herein, and if called as a witness, I would and could competently testify to the matters stated herein. I submit this declaration in opposition to the Erbamont Parties' motion for summary judgment.

2. Attached hereto as Exhibit 1 is a true and correct copy of the Declaration of Michael D. Cannon.

3. Attached hereto as Exhibit 2 is a true and correct copy of the Declaration of John C. Beyer, Ph.D. Attachment A to Dr. Beyer's Declaration is a true and correct copy of pages from a document produced in

discovery by the Cetus Parties. Attachments B-D to the Declaration of Dr. Beyer are true and correct copies of pages from documents produced in discovery by the Erbamont Parties.

4. Attached hereto as Exhibit 3 is a true and correct copy of pages from the Deposition of James E. Rurka of August 27, 1992.

5. Attached hereto as Exhibit 4 is a true and correct copy of pages from the Petition for Review of Action of the United States Food and Drug Administration: Brief for Respondent, produced in discovery by the Erbamont Parties.

I declare under penalty of perjury under the laws of the United States of America that each of the foregoing statements is true and correct.

Executed this 15th day of September, 1992 in Washington, D.C.

//S//
Douglas V. Rigler

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Exhibit 1
to Rigler
Declaration

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

SICOR LIMITED and ALCO CHEMICALS, LTD., Plaintiffs,	* CIVIL ACTION * NO. C-91- * 1253-DJL
v.	*
CETUS CORPORATION; CETUS GENERIC CORPORATION; BEN VENUE LABORATORIES, INC.; BEN VENUE GENERIC CORPORATION; CETUS-BEN VENUE THERAPEUTICS; ERBAMONT N.V.; ERBAMONT, INC.; and	* (FILED UNDER * SEAL) * * DECLARATION * OF MICHAEL D. * CANNON IN * OPPOSITION TO * THE ERBAMONT * PARTIES'

FARMITALIA CARLO ERBA S.r.l., Defendants.	* MOTION FOR * SUMMARY * JUDGMENT
ERBAMONT INC. and FARMITALIA, CARLO ERBA S.r.l. Counterplaintiffs, v. SICOR LIMITED; ALCO CHEMICALS, LTD. and SICOR S.p.A., Counterdefendants.	* DATE: September * 30, 1992 * TIME: 10:00 am * PLACE: Court- * room 3

I, MICHAEL D. CANNON, declare as follows:

1. This declaration is made on my own personal knowledge, and if called to testify, I could competently testify to the matters stated herein.

2. My name is Michael D. Cannon and I am employed by Alco Chemicals, Ltd. ("Alco") as manager for new product development, and by Sicor, S.p.A. as marketing manager and have been at all times relevant to this action. I make this Declaration in Opposition to the Motion for Summary Judgment of the Erbamont Parties.

3. Sicor Limited is party to a contract with Alco Chemicals, Ltd., which gives Alco exclusive distribution rights in certain countries including the United States with respect to doxorubicin manufactured

by Sicor S.p.A. Sicor S.p.A. manufactured bulk doxorubicin under a tolling arrangement with Sicor Limited, which owned the daunorubicin producing microorganism, from which doxorubicin is produced.

4. With the expiration in June 1988 of the Farmitalia product patent for doxorubicin, Sicor, S.p.A., Sicor Limited (Sicor's S.p.A. wholly owned UK subsidiary), and Alco Chemicals, Ltd. determined to enter into competition for the sale of doxorubicin in the United States market. Prior to the expiration of the patent, the Erbamont Parties (acting through Farmitalia Carlo Erba, S.r.l., ("Farmitalia") as the manufacturer, and Erbamont, Inc. as the United States distributor) enjoyed a monopoly in doxorubicin, which is the most widely prescribed anticancer drug in the United States.

5. Sicor is a chemical company which manufactures pharmaceutical active ingredients and which has a broad range of generic products, but it had no distributor for doxorubicin products in the U.S. Accordingly, Sicor and Alco began to look for a method of marketing doxorubicin in competition with Erbamont.

6. It was difficult to obtain a United States finisher and distributor for Sicor-supplied doxorubicin due to what plaintiffs found to be significant barriers to entry. Both the bulk form and the finished form of doxorubicin have to be approved by the United States Food and Drug Administration ("FDA") before the finished product can be marketed. Because Sicor's production facilities are operated in compliance with Good Manufacturing

Practices, Sicor did not anticipate undue difficulty in obtaining FDA approval for its bulk doxorubicin. Such approval was granted on December 20, 1988.

7. I note that in paragraph 16 of his declaration, Mr. Russillo, President of Ben Venue Laboratories, Inc., admits that even as late as 1991 CBVT [Cetus Ben Venue Therapeutics] "was unable to obtain for resale in the United States finished doxorubicin manufactured by any other drug finisher."

8. Although doxorubicin is effective against cancer, it also is a highly toxic drug even in small quantities. During the entire course of therapy, a single patient is rarely administered more than a half a gram of the drug. Accordingly, Sicor had to find a company in the United States with the capability of handling highly toxic substances, and producing sterile vials containing either a solution or lyophilized (freeze dried) product, and thereafter of marketing and distributing it. Among the American pharmaceutical industry, only three companies were identified as having the necessary capabilities. The primary reason for the limited number of qualified companies is the fact that most pharmaceutical companies simply do not include the lyophilizing of toxic drugs in their manufacturing capabilities.

9. The three companies identified by Sicor and Alco with the necessary capabilities were: Lederle, Lymphomed, and Ben Venue Laboratories in conjunction with Cetus Corporation as the marketing and distributing arm.

10. Lederle is a major name-brand marketer. It had little interest in entering into the generic market in conjunction with Sicor. Thus, the only potential entries into the U.S. market were either Cetus/Ben Venue or Lymphomed. During discussions it turned out that Lymphomed was not interested except at unacceptable terms. Thus there was only one available U.S. finishing and distribution outlet for Sicor to compete in the U.S. market.

11. Effective November 5, 1987, Sicor entered into a Supply Agreement with CBVT. Effective the same date, Alco entered a Distribution Agreement permitting CBVT to sell and distribute doxorubicin supplied by Sicor. Sicor received FDA approval to market bulk doxorubicin in the United States on December 20, 1988. CBVT thereafter obtained FDA approval for the sale of finished Sicor doxorubicin in March 1989.

12. In 1989, Sicor entered the U.S. market for doxorubicin through CBVT's sale of finished Sicor doxorubicin as a generic product. Sicor's bulk doxorubicin was consistently of high quality; CBVT never rejected any Sicor bulk or complained about any aspect of the product.

13. According to the terms of the Supply and Distribution Agreements, Alco and Sicor were entitled to 50% of CBVT's revenues following the sale of finished Sicor doxorubicin in the market. Sicor and Alco were only paid for doxorubicin that was actually sold. They were not paid for bulk doxorubicin lost in the manufacturing process. The effect of this pricing

arrangement was to enable CBVT to compete vigorously in the doxorubicin market without having to go back and renegotiate for the basic raw material, bulk doxorubicin. This was particularly important since bulk doxorubicin is the most significant cost in finished doxorubicin. For example, in a 50 mg. vial of finished doxorubicin, the bulk accounted for an estimated 85% of manufacturing costs. Because of the way the pricing formula worked, Sicor and Alco had a direct continuing interest in all sales of CBVT's finished doxorubicin in the market.

14. Prior to April, 1991, when CBVT, encouraged by the Erbamont parties, breached the Supply and Distribution Agreements, the net sales price of CBVT's generic doxorubicin had declined substantially for customers. Plaintiffs were aware of this because the Alco/Sicor 50% share of revenues declined from $1,600,000 per kilo in June 1989 to $849,000 per kilo in June 1991.

15. Sicor and Alco let the Cetus parties know that they would be able to support a continued decline in the price of finished doxorubicin.

16. In September, 1990, a temporary injunction was issued in Italy at the behest of Farmitalia, which resulted in the shutdown of Sicor's doxorubicin production facility. Sicor and Alco contacted Mercian Corporation, a company with which the Plaintiffs had a friendly relationship. Mercian is one of the few producers of bulk doxorubicin in the entire world which produces doxorubicin of a quality acceptable to the FDA for sale in

the U.S. market. In addition, Mercian had already received FDA approval for its production of bulk doxorubicin.

17. Mercian, which had not previously entered the U.S. market (and which I understand has not done so to this day) indicated an interest in so doing by selling to CBVT through Sicor.

18. Representatives of CBVT and Cetus indicated to Mercian in my presence that Mercian was an acceptable supplier and that CBVT wanted to proceed to obtain FDA clearance to market finished doxorubicin made from Mercian bulk. No one at CBVT or Cetus gave any indication that they were not going to proceed with Mercian bulk until a March 17, 1991, meeting which I attended at which Cetus announced its agreement with Erbamont.

19. Sicor purchased 220 grams of doxorubicin from Mercian which were shipped to CBVT on January 25, 1991. This shipment was made to provide ample time for batch testing and preparation of the FDA application for the sale of the finished product. The filing was to be made shortly after April 10, 1991 when an Erbamont process patent on doxorubicin expired. Cetus never informed Sicor that the FDA application would not be fully ready for filing shortly after this date.

20. As a result of Erbamont's interference with Sicor and Alco's finisher and with the signing of an exclusive supply contract for doxorubicin between

Erbamont and Cetus, both Sicor and Mercian were effectively eliminated as sellers in the U.S. market. On information and belief, CBVT likely retains Sicor bulk and finished doxorubicin in inventory which it has not sold and will not sell because of CBVT's agreement with Erbamont. Certainly Cetus or CBVT have not made an accounting of their still existing inventory of Sicor doxorubicin.

21. The shortage of suppliers is no accident. Immediately upon the expiration of the product patent, Erbamont took a number of steps within the U.S. and in Italy to prevent Sicor, Mercian and Meiji from competing with it. These steps included attempts to have the FDA bar Sicor products on the basis of alleged quality defects, threatening to file or filing a series of patent infringement actions in the U.S. and Italy, and the filing of a Section 337 proceeding before the United States International Trade Commission ("ITC") seeing to enjoin the importation and sale of bulk doxorubicin produced by Sicor and Meiji and finished doxorubicin by CBVT and Bristol-Myers Company in the United States.

22. With respect to the various patent infringement suits by Erbamont, it is important to note that thus far not a single Court or agency in the United States or in Italy has issued any finding of infringement of any Erbamont patent relating to doxorubicin. In October 1990, the ITC ruled that there was no violation of Section 337 by Sicor or others. The FDA fully approved Sicor doxorubicin for sale in the U.S.

23. The contract with Cetus in which Erbamont stole away Sicor's only U.S. distributor, and the attendant settlement had the effect of limiting a planned challenge by Cetus to a patent for doxorubicin in solution form belonging to Farmitalia.

24. Other actions by Erbamont included:

(1) the filing of charges that counterfeit bulk doxorubicin was being sold under the Erbamont label (an accusation that was thoroughly disproved and discredited as to Sicor, which was investigated but not charged);

(2) accusations that Sicor had stolen from Erbamont the daunorubicin producing microorganism used in the production of Sicor's doxorubicin (once again disproved by the evidence and dismissed by the Italian Court on June 26, 1991, when Sicor was permitted to resume fermentation of daunorubicin); and

(3) soon-to-be-resolved accusations that Sicor had stolen Erbamont's trade secrets relating to the production of doxorubicin.

25. The net effect of Erbamont's signing an exclusive supply contract with Cetus has been to eliminate two of the only three companies in the world other than Erbamont which have the requisite FDA clearance to market bulk doxorubicin in the United States.

I declare under penalty of perjury under the laws of the United States of America that each of the foregoing statements is true and correct.

Executed this 9th day of September, 1992, in Washington, D.C.

//S//
Michael D. Cannon

(2)

No. 95-8

Supreme Court, U.S.
FILED
JUL 31 1995
CLERK

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1995

SICOR LIMITED, ALCO CHEMICALS LTD.,
Petitioner,

VS.

CETUS CORPORATION;
CETUS GENERIC CORPORATION;
BEN VENUE LABORATORIES, INC.;
BEN VENUE GENERIC CORPORATION;
and CETUS-BEN VENUE THERAPEUTICS,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

RESPONDENTS' OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

In accordance with Rule 15.1 of the Rules of this Court, we show below that none of the questions stated in the Petition is presented on this record. Each of the questions presupposes that Petitioners were (or at least one of them was) manufacturing competitors at the relevant time. As both the district court and court of appeals found, neither was.

LIST OF PARTIES

Petitioners accurately list the parties of record in the court of appeals, but incompletely respond to Rule 29.1 of the Rules of this Court.

Petitioner Sicor Limited has forfeited its charter in the United Kingdom. Sicor, S.p.A. is its successor in interest.

As the court of appeals accurately noted (App. 4a n.1), Respondent Cetus Corporation, formerly a publicly traded corporation, was acquired by Chiron Corporation through a merger effective December 12, 1991, and subsequently changed its name to Cetus Oncology Corporation on March 6, 1992. As of December 12, 1991, Cetus Corporation was, and Cetus Oncology Corporation currently is, a wholly owned subsidiary of Chiron Corporation. Chiron Corporation is a publicly traded corporation. Approximately 49.5 percent of its shares are held by Ciba-Geigy Limited, directly or through its wholly owned subsidiaries. Subsidiaries which are not wholly owned by Chiron Corporation (excluding officer or director qualifying shares) are: Chiron Technolas Opthalmologics Systeme GmbH, Ciba Corning Diagnostics de Mexico S.A. de C.V., Domilens S.A. (Sweden), and Cetus-Ben Venue Therapeutics. Chiron Corporation has announced the pending acquisition of all of the outstanding shares of Viagene, Inc., subject to requisite governmental and other approvals. Other affiliates which have issued shares to the public are Cetus Healthcare Limited Partnership I and Cetus Healthcare Limited Partnership II.

Cetus Generic Corporation is a wholly owned subsidiary of Cetus Oncology Corporation.

Ben Venue Laboratories, Inc. has no publicly traded parent subsidiary, or affiliated corporations.

Ben Venue Generic Corporation is a wholly owned subsidiary of Ben Venue Laboratories, Inc.

Cetus-Ben Venue Therapeutics is a partnership between Cetus Generic Corporation and Ben Venue Generic Corporation.

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No. 95-8

In the Supreme Court

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OCTOBER TERM, 1995

SICOR LIMITED, ALCO CHEMICALS LTD.,
Petitioner,

VS.

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CETUS GENERIC CORPORATION;
BEN VENUE LABORATORIES, INC.;
BEN VENUE GENERIC CORPORATION;
and CETUS-BEN VENUE THERAPEUTICS,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

RESPONDENTS' OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

STATEMENT OF THE CASE

We first state the facts pertinent to the Petition, largely as found by both the district court and the court of appeals,[1]

[1] The district court entered a summary judgment, finding that certain facts were not controverted and thus not in dispute. The court of appeals also found certain of those facts not to be in dispute. This circumstance is akin to the Two Court Rule, that only in exceptional circumstances does this Court undertake to review concurrent findings of fact by two

because the questions purportedly presented are, in fact, not present on this record. We then describe the interlocutory posture of the case, because one of the reasons to deny the Petition is that any question of the kind tendered is highly likely to be rendered moot upon remand to the district court.

I. THE PERTINENT FACTUAL BACKGROUND

A. *Respondent CBVT's* Initial Entry into the United States Generic Doxorubicin Market by Obtaining Bulk Doxorubicin from Petitioners

There are five respondents. One of them, Cetus-Ben Venue Therapeutics, Inc. ("CBVT"), is a partnership formed by two others of them; the remaining two respondents are the corporate parents of those two partners. (App. 4a n.1; App. 34a n.1 and accompanying text.) CBVT is the entity that was involved in the transactions of which petitioners, plaintiffs in the district court, complained. The court of appeals referred to "CBVT" as encompassing all of the parties that are here respondents (App. 8a n.5), and so shall we.

Until June 1988, other parties, referred to below as "Erbamont" or the "Farmitalia Group", held a United States product patent covering a chemical compound that is widely used in cancer treatment, doxorubicin. (App. 3a; App. 33a-34a.) Upon expiry of that product patent, Erbamont still held certain process patents whose term did not expire until nearly three years later. (App. 34a.)

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courts below. *Goodman v. Lukens Steel Co.*, 482 U.S. 656, 665 (1987); *NCAA v. Board of Regents of Univ. of Okla.*, 468 U.S. 85, 98 n.15 (1984); *Graver Tank & Mfg. Co. v. Linde Air Prod. Co.*, 336 U.S. 271, 275 (1949).

Where both of the lower courts found a fact to which we refer, we cite the court of appeals' opinion first and then the district court's order. Where only one citation appears, only one of the courts found the fact to which reference is being made.

Upon expiry of Erbamont's United States product patent, CBVT wished to sell doxorubicin in the United States. To do so, it required a supply of bulk doxorubicin from a manufacturer who had the requisite approval of the United States Food and Drug Administration (the "FDA"). (App. 2a-4a.) CBVT entered into a supply and distribution agreement with petitioner Sicor Limited.[2] CBVT's agreement with Sicor Limited was an exclusive agreement for all of CBVT's requirements, precluding CBVT from acquiring bulk doxorubicin from any other supplier. (App. 4a; App. 34a.) CBVT began its entry into the doxorubicin market in the United States with this supply, making its first sale on May 25, 1989. (App. 5a.)

B. The Shutdown of the Manufacturing Plant Which Was the Source for Petitioners' Supply of Doxorubicin to CBVT

The supply agreement between CBVT and petitioner Sicor Limited was for a three-year term commencing with CBVT's first sale in the United States, hence it was to run through May 24, 1992. (App. 5a.) Two months into that three-year term, the plant which had been manufacturing the doxorubicin to be supplied to CBVT was shut down by authorities in Italy and remained closed for nearly nine months. (App. 6a.) That plant temporarily reopened during 1990 and was again shut down by Italian authorities in September 1990. It has remained closed ever since. (*Id.*)

---

[2] Through amendments, by the time this action was commenced in the district court that agreement had taken the form of two agreements, one between CBVT and petitioner Sicor Limited for the supply of bulk doxorubicin and one between CBVT and petitioner Alco Chemicals, Ltd. for distribution. (App. 3a-5a; App. 34a.) For present purposes, the fact of those different contracts is not material, and we shall simply refer to the existence of a supply agreement between CBVT and Sicor Limited.

After half a year had passed following the second, final, shutdown of the Italian plant, CBVT entered into an alternative supply agreement for bulk doxorubicin with the Farmitalia Group. Their agreement also settled all pending litigation between the Farmitalia Group and CBVT. (App. 8a; App. 35a.)

This suit followed.

C. Neither of the Petitioners Was the Manufacturer of the Bulk Doxorubicin Which Respondents Had Agreed To Purchase from Petitioners.

CBVT's written supply contract referred to a third party, Sicor, S.p.A., as the manufacturer of the bulk doxorubicin which it was buying. It was the manufacturing plant of Sicor, S.p.A. that was shut down by the Italian authorities as stated above. On a motion for summary judgment, the district court interpreted the contract between CBVT and Sicor Limited as requiring that the bulk doxorubicin be manufactured at that plant in Italy owned by Sicor, S.p.A. (App. 39a-42a.) As a result, among other things the district court held that since petitioners could not perform their contract in view of the shutdown of the Sicor, S.p.A. plant in Italy, the contract was canceled as a matter of law and CBVT was entirely free to protect itself by entering into an alternative supply agreement with the Farmitalia Group. (App. 42a.)

The court of appeals held that the supply contract was ambiguous and that it might be interpreted to require only that bulk doxorubicin be supplied in conformance with stated technical specifications, whether or not manufactured by Sicor, S.p.A. at its plant in Italy. (App. 17a-19a.) The court of appeals remanded for, among other things, further proceedings in light of that perceived ambiguity.

In opposing the motion for summary judgment in the district court, petitioners had offered evidence that during

the early period of the final shutdown of the Sicor, S.p.A. plant there had been negotiations between petitioners and a Japanese company, Mercian. According to petitioners, Mercian would have been able to obtain timely FDA approval and thereafter would have been able to supply bulk doxorubicin to CBVT. (App. 7a-8a.) Petitioners asserted that they would have obtained a middleman's commission on such substitute supply if CBVT had not turned instead to the Farmitalia Group. In reversing and remanding, the court of appeals held that there was a triable issue as to whether Sicor was damaged by loss of profit "as an intermediary between third party manufacturers and CBVT, notwithstanding the [Italian] injunction and sequestration order." (App. 23a.)

Thus, both lower courts concurred that neither of these petitioners was ever to be a manufacturer-competitor of Erbamont or the Farmitalia Group. Even before the Italian authorities shut down the Sicor, S.p.A. plant, petitioners were only intermediaries. Even if one conceives that petitioner Sicor Limited could be considered to be a manufacturer-competitor by reason of the fact that it was a subsidiary of Sicor, S.p.A., it was *no longer a manufacturer-competitor* at the pertinent time *when CBVT entered into its alternative supply agreement with Erbamont.* CBVT entered into that alternative supply agreement *precisely because the Sicor Italian supply was no longer available to it.*

Thus, both lower courts concurred that, at most, petitioners were potential intermediaries, hoping to earn a middleman's commission if CBVT turned to another possible alternative source of supply after petitioners' original supplier, Sicor, S.p.A., was shut down.

From that fact alone, the court of appeals held that any harm to competition came from the Italian authorities' shutdown of the Sicor, S.p.A. plant, not from the agreement between CBVT and Farmitalia. (App. 12a-13a.)

II. THE INTERLOCUTORY POSTURE OF THE CASE

Although the court of appeals affirmed the district court's summary disposition of petitioners' antitrust claims, it reversed as to some of petitioners' state law claims and remanded for further proceedings.

Among the issues remanded to the district court by the court of appeals are questions of contract interpretation of the basic CBVT supply agreement with Sicor Limited. If that agreement is interpreted after remand (either at or before trial or upon a subsequent appeal) as the district court had done on summary judgment, then it will have been adjudicated that CBVT had no duty under that contract to purchase doxorubicin from any substitute third party supplier obtained by petitioners once Sicor, S.p.A.'s plant was shut down. That would end any possibility of any kind of actionable damage to petitioners, regardless of their contentions about their antitrust claims. That would return the matter to the same posture as the district court had concluded was correct on the basis of its interpretation of the contract:

> "In this case, plaintiffs can prove no damages from the alleged breach because they have been incapable of competing in the U.S. bulk doxorubicin market since September of 1990. The Sicor, S.p.A. plant was shut down by the Italian government well before CBVT settled its litigation with Erbamont; thus, Sicor could not have suffered any lost profits since it couldn't even manufacture or sell any doxorubicin."

(App. 46a.)

Although the court of appeals found (App. 23a) that summary judgment was inappropriate on the record before it because of the ambiguity that it found in the parties' contract, if CBVT prevails on that question of contract

interpretation on remand the matter will be right back where the district court had said it should be on summary judgment.

SUMMARY OF ARGUMENT

1. None of the questions purportedly presented arises on the present record.

We submit that the shutdown of the Sicor, S.p.A. plant in Italy throughout the relevant time period was the sole and proximate cause of any injury to petitioners. At the very least, the shutdown of the Sicor, S.p.A. plant eliminated petitioners as "manufacturer-competitors" of the Farmitalia Group, even if one would ever have so regarded them in light of the fact that it was Sicor, S.p.A., not either petitioner, that was to be the manufacturer.

As a result, this is not a case in which one manufacturer is foreclosed from a market because a competitive manufacturer exercises exclusionary market power through an exclusive contractual arrangement with a distributor. Each of the questions tendered to this Court in the Petition is founded upon the assumption that it is such a case, but it is not such a case.

For the same reasons, there was no injury in fact, much less antitrust injury, to petitioners by reason of CBVT's obtaining an alternative supply from the Farmitalia Group after Sicor, S.p.A.'s plant was shut down. As both courts below found, petitioners' injury came from the shutdown of the Sicor, S.p.A. plant, not from CBVT's agreement with the Farmitalia Group.

2. Even if the questions stated were presented, none would warrant grant of the writ.

Petitioners claim error, asserting that the court of appeals' decision is at odds with decisions of this Court. The authori-

ties with which the court of appeals decision is said to conflict are long-standing and basic antitrust cases concerning exclusive dealing. The court of appeals did not depart from them, nor does its opinion purport to proclaim principles at odds with any of them. At the very most, petitioners assert that the court of appeals applied settled law in an erroneous way.

The court of appeals' and district court's finding that it was pro-competitive for CBVT to continue its attempt to enter the market by obtaining an alternative source of supply was fully in line with basic rule of reason analysis. CBVT would have had to increase its risk of entry by hoping for an even better arrangement if it had rejected Farmitalia's offer, as well as continuing to run the risk of patent infringement litigation which might have further foreclosed entry. No subtle issue of antitrust law is raised on these facts.

Petitioners have taken out of context the court of appeals' phrase about "making money". The court of appeals did not purport to create a safe haven from antitrust liability for all parties whose motivation is to make money. The court of appeals used that phrase in negating any inference that there had been predatory below-cost pricing.

Nor was any agreement tendered in the district court that provided for a cessation of price competition between manufacturers. If there had been, it would hardly require this Court's grant of *certiorari* to pronounce horizontal price-fixing agreements unlawful. The court of appeals did not proclaim that horizontal price-fixing was lawful.

3. The questions purportedly presented may well be rendered moot by further proceedings after remand to the district court; the interlocutory posture of the case is further reason not to grant the writ.

Moreover, resolution of state law issues which the court of appeals remanded to the district court could render moot all of the antitrust issues purportedly presented now. The case being at an interlocutory stage, it is not ripe for this Court's consideration on discretionary *certiorari* review.

ARGUMENT

I. THE QUESTIONS PURPORTEDLY TENDERED IN THE PETITION ARE NOT PRESENTED ON THIS RECORD.

In accordance with the admonishment in Rule 15.1 of the Rules of this Court, we show that the questions purportedly tendered are not presented on this record.

A. Petitioners Were Not Manufacturer-Competitors because Sicor, S.p.A.'s Plant Was Shut Down during the Entirety of the Relevant Time Period.

We have shown above (pp. 3-5) that both courts below concurred that neither petitioner was a manufacturer-competitor of the Farmitalia Group. Yet that is precisely the pose to which petitioners pretend in their statement of questions presented. This fact alone eliminates any possibility of petitioners recovering by reason of conduct for which a manufacturer-competitor might have standing to recover.

Petitioners' first "question presented" concerns supposed barriers to entry by one manufacturer because a rival manufacturer captured the only viable distributor. But both courts below concurred that petitioners were not a manufacturer-

competitor.[3] Petitioners' second "question presented" assumes that petitioners themselves constitute the "only significant competitor", but both courts below concurred that petitioners were not a manufacturer-competitor at all. Petitioners' third "question presented" refers to supposed cessation of price competition "at the wholesale level", but both courts below concurred that petitioners were not doing business at the wholesale level.

When petitioners argue here that the court of appeals erred, they submit to this Court that the court of appeals failed to take account of petitioners' competition at the very manufacturing level where petitioners have had no competition to offer since the Italian authorities shut down Sicor, S.p.A.'s plant. For instance (Petition at 10), petitioners speak of Erbamont taking over CBVT as an act where Erbamont became "the exclusive supplier to its principal competitor's only distributor"; and to "exclusion of the monopolist's competitor through capture of the competitor's only distributor"; and to "elimination of the only manufacturer which competed on the basis of price"; and (Petition at 12) to "eliminating competitors". Those are simply fictitious sentiments, not in any way supportable on this record.

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[3] If it were true that CBVT was the only viable distributor and that it was essential to any manufacturer to have a viable distributor, there could never be more than one supplier and it would not matter who that supplier was. As the court of appeals noted (App. 14a n.9):

> "Sicor's allegation that no other finisher-distributor would have been readily available to contract with Sicor or other potential foreign entrants into the American market at the supply level is arguably beside the point, for elimination of Sicor as a competitor would still leave the market essentially where it was before Sicor's entry, *viz.*, with two producers and three finisher-distributors."

B. The Court of Appeals' Reference to "Making Money" Negated Any Inference of Predatory Pricing at a Short Term Loss, and Petitioners Err in Implying that the Court of Appeals Meant To Establish a Safe Harbor Precluding Antitrust Liability.

Petitioners have taken the court of appeals' reference to "making money" out of context. We replace it (App. 13a):

> "Moreover, it is apparent from the materials before us that valid business reasons existed for CBVT's action, *i.e.*, CBVT's reason for buying from Farmitalia was to obtain the product, and Farmitalia's reason for selling that product to CBVT was to make money. In the absence of a showing of selling at a loss or similar conduct explainable only by a motive to reduce or eliminate competition, the appellants' claim is not persuasive."

By no stretch of imagination was the court of appeals creating a safe haven against antitrust liability because a party is motivated to "make money". Any doubt of that is dispelled by the footnote the court of appeals appended at the close of the portion just quoted (App. 13a n.8):

> "While it is true as a general proposition that the existence of valid business reasons motivating a monopolist's conduct is ordinarily a question of fact [citation omitted], the absence of evidence to the contrary in the instant case is dispositive of this issue. *See also Matsushita*, 475 U.S. at 588 ('conduct as consistent with permissible competition as with illegal conspiracy does not, standing alone, support an inference of antitrust conspiracy')."

II. THERE IS A HIGH LIKELIHOOD THAT THE QUESTIONS PURPORTEDLY PRESENTED WILL, IN ANY EVENT, BE RENDERED MOOT UPON REMAND TO THE DISTRICT COURT.

This Court does not ordinarily issue a writ of certiorari from an interlocutory order. *E.g., Brotherhood of L. F. & E. v. Bangor & A. R. C.*, 389 U.S. 327, 328 (1967); R. Stern, E. Gressman, S. Shapiro, *Supreme Court Practice*, § 4.18, p. 224 (6th ed. 1986). The present decision is not only interlocutory, but the questions urged upon this Court are likely to evaporate.

After remand to the district court from the court of appeals, whether before trial, at trial, or upon a subsequent appeal, it is highly likely that it will be determined that petitioners were obliged to provide bulk doxorubicin specifically manufactured at the Sicor, S.p.A. plant in Italy. That will end all aspects of this case, because there will be no possible showing of injury in fact from the supposed antitrust violations.

That result is highly likely because petitioners themselves so averred in their complaint (App. 39a), and such averments are conclusive unless petitioners seek and receive leave to amend in the district court. *E.g., American Title Ins. Co. v. Lacelaw Corp.*, 861 F.2d 224, 226 (9th Cir. 1988).

That result is also highly likely because the contract in issue so states in its own recitals (App. 41a), and such recitals are conclusive as between the parties under the applicable California law. Calif. Evid. Code § 622; *Banco do Brasil, S.A. v. Latian, Inc.*, 234 C.A.3d 973 (1991), *cert. denied*, 504 U.S. 986 (1992).

III. WHEN PETITIONERS WERE UNABLE TO PERFORM THEIR SUPPLY AGREEMENT, IT WAS PRO-COMPETITIVE FOR RESPONDENTS TO MAKE ALTERNATIVE SUPPLY ARRANGEMENTS IN ORDER TO CONTINUE THEIR ENTRY INTO THE MARKET.

CBVT had been a new entrant in the United States doxorubicin business after the product patent covering it expired. CBVT was then utterly dependent upon petitioners for its supply of bulk doxorubicin. When petitioners could no longer provide bulk doxorubicin from the Sicor, S.p.A. plant in Italy, CBVT's continued attempt to enter the market was severely jeopardized. Any alternative source of supply would have been better than leaving CBVT stranded with no source of supply. Any contract of supply in lieu of the one petitioners could no longer perform was pro-competitive in reviving the chance of entry for CBVT. Particularly in the very market petitioners describe, every intendment favored an arrangement that would enhance CBVT's chance of surviving as a new entrant.

If Erbamont had refused to deal with CBVT at all, CBVT would have been at the mercy of a possible arrangement with the Japanese supplier, Mercian, pending necessary approvals from the FDA. In the district court, there were various "scenarios" of such approval offered by petitioners. (App. 7a-8a.) They were all just that, "scenarios" that might or might not eventuate. None of them, however plausible or implausible, was as certain as an assured source of supply from Erbamont, which was already fully approved by the FDA and immediately available.

Both courts below concluded that CBVT's resort to an alternative source of supply from Erbamont was pro-competitive. (App. 12a-13a; App. 51a.) It is fundamental, and has been ever since Justice Brandeis's famous statement in *Chicago Board of Trade v. United States*, 246 U.S. 231, 238

(1918), that only unreasonable restraints are unlawful restraints. *E.g., NCAA v. Board of Regents of Univ. of Okla., supra*, 468 U.S. at 98 n.17 and accompanying text. The antitrust law does not require a party to forego known, procompetitive agreements in order to speculate on the likelihood of obtaining yet another agreement that may prove to be of greater or lesser advantage, if it eventuates at all. That would subject parties to second-guessing of the most pernicious kind. A wrong guess in foregoing an available procompetitive contract would lead to loss of that very procompetitive alternative. The law does not require one to forego a known and socially-desirable "bird in hand" in order to see whether there might later be an even more desirable "bird in the bush".

Nothing in conventional antitrust analysis requires such a result, and nothing in the court of appeals' decision is at odds with conventional antitrust analysis. As the court of appeals noted (App. 11a), it is undisputed that the contract at issue is a vertical supply agreement. Exclusive supply agreements, such as both the petitioners' own agreement with CBVT and CBVT's substitute supply agreement with Erbamont, are evaluated under the rule of reason.[4]

Applying the traditional analysis of requirements contracts to the CBVT-Erbamont contract frames the question as whether competitive manufacturers of doxorubicin are being unreasonably foreclosed from their ability to reach health care users of doxorubicin because of the CBVT contract with Erbamont. III P. Areeda & D. Turner, *Anti-*

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[4] Petitioners included claims under both Section 1 and Section 2 of the Sherman Act, 15 U.S.C. §§ 1, 2. Exclusive dealing contracts being by their nature "exclusionary," analysis is the same whether conducted under the rule of reason for a Section 1 claim or whether the claim be placed under Section 2 simply because the supplier happens to have monopoly power. III P. Areeda & D. Turner, *Antitrust Law*, ¶ 731a, pp. 247-48 (1978).

trust Law, ¶ 732 (1978). *Cf., Tampa Electric Co. v. Nashville Coal Co.*, 365 U.S. 320 (1961); *Standard Oil Co. v. United States*, 337 U.S. 293 (1949), both of which were decided under Section 3 of the Clayton Act, whose prohibition is broader than the Sherman Act provisions petitioners have invoked. Petitioners have not been such a competitor at any time since the Sicor, S.p.A. plant was shut down. Nor do petitioners suggest any analysis of how any other existing manufacturer has been foreclosed from the health care market by reason of CBVT's contract with Erbamont. Indeed, if, as petitioners suggest, the effect of the Erbamont-CBVT contract were to keep prices up, that would simply add incentive to entry for any other manufacturers that may exist. Furthermore, to the extent that CBVT provides a particularly favorable channel of distribution, in fully exploiting its own capabilities in finishing and marketing doxorubicin in competition with Erbamont it is providing the very efficiency in distribution to health care users of these products that the antitrust laws are intended to achieve from competition.

Petitioners' submissions would make it per se unlawful to have dual distribution arrangements, *i.e.*, agreements where a manufacturer competes with its distributor. Such agreements are a commonplace in our economy, are frequently pro-competitive, and are certainly not *per se* unlawful. *See, e.g., Illinois Corporate Travel v. American Airlines*, 889 F.2d 751, 753 (7th Cir. 1989), *cert. denied*, 495 U.S. 919 (1990):

> "Dual distribution therefore does not subject to the per se ban a practice that would be lawful if the manufacturer were not selling direct to customers; antitrust laws encourage rather than forbid this extra competition."

The only other antitrust principle which petitioners claim to have been established by this Court and ignored by the court of appeals below is found in their reference (Petition

23) to *United States v. Container Corp. of America*, 393 U.S. 333, 337 (1969). *Container Corp.* considered agreements of competitors to exchange price information without an accompanying agreement to adhere to a price schedule. 393 U.S. at 334. The defendants in *Container Corp.* had urged that the Court ought not infer a price-stabilizing agreement because prices had been declining. Justice Douglas, writing for the majority of a divided Court, said that stabilizing prices as well as raising them is within the ban of Section 1 of the Sherman Act. That reference to stabilizing prices is what petitioners quote. (Petition 23.) The quotation had nothing to do with exclusive dealing agreements. *Container Corp.* had nothing to do with exclusive dealing analysis. Nothing in *Container Corp.* establishes a *per se* rule that all exclusive dealing contracts are unlawful if they are accompanied by "price stabilization".

Nor does the court of appeals' decision create a conflict between the circuits. Petitioners' references to four cases from other courts of appeals are all wide of the mark.

Perington Wholesale, Inc. v. Burger King Corp., 631 F.2d 1369 (10th Cir. 1979), involved reversal of the district court's dismissal on the pleadings for failure to state a claim. The plaintiff had been a distributor who supplied certain goods to Burger King franchisees. The court of appeals held that its complaint was susceptible of interpretation to claim that its distribution contract had been terminated at the behest of a competitive distributor (*id.* at 1375):

> "Perhaps Burger King, or its subsidiary Davmor, could supply all logoed paper cups and other items to its outlets and franchisees without violation of the antitrust laws. But once independent businesses are employed in its distribution structure, it cannot accede to the demands of one competitor-distributor to lessen competition in that entity's market. [Citation omitted.]"

The court thus held that it was improper to cut off one distributor at the behest of its competitor. Such distributor-cutoff cases are far wide of the analysis of exclusive dealing agreements as such and offer no guidance to proper analysis of the CBVT agreement with Sicor Limited. The court of appeals' decision below is in no way at odds with the *Burger King* decision.

Petitioners' argument (Petition 16-17) that the court of appeals decision below is in conflict with *SmithKline Corp. v. Eli Lilly & Co.*, 575 F.2d 1056 (3rd Cir.), *cert. denied*, 439 U.S. 838 (1978), is, with all due respect, unintelligible. *SmithKline* had nothing whatever to do with exclusive dealing agreements or with any other principle of antitrust analysis to which petitioners make even tangential reference. In *SmithKline*, the Third Circuit addressed a question of product market definition in a Section 2 case.[5] Having agreed with the district court's definition of the product market, the court then considered whether the defendant had monopoly power and whether its pricing program, which had admittedly been adopted after expiry of its product patent, constituted monopolization under Section 2. In referring to the defendant's market power in the properly-defined product market, the court noted that the fact that the defendant had *obtained* that position when it held a valid product patent did not insulate it from Section 2 liability for conduct that was allegedly improper in *maintaining* its monopoly power after expiry of the product patent. The court then held that *maintaining* its monopoly power *after* expiry of the product patent through an improper pricing

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[5] The court so described the question before it at the outset of its opinion (575 F.2d at 1057-58):

> "The major question for decision is whether the district court in a non-jury trial erred in defining the relevant product market in a proceeding . . . ."

Its opinion centered on that question. *Id.* at 1062-65.

plan constituted unlawful monopolization. 575 F.2d at 1065. There is nothing whatever in the defendant's pricing plan there at issue which is remotely related to any question about exclusive dealing in the case at Bar. There was nothing analyzed by the Third Circuit in *SmithKline* which could inform, much less conflict with, anything decided by the court of appeals below.

Petitioners also assert a conflict between the court of appeals' decision below and *Dictograph Products v. Federal Trade Comm'n*, 217 F.2d 821, 827 (2d Cir. 1954), *cert. denied*, 349 U.S. 940 (1955).[6] Petitioners say (Petition 18) that the market shares referred to in *Dictograph* should control disposition of the present case. Market share of a manufacturer is not the relevant inquiry when one is considering a case in which the *distributor* is said to be the potential bottleneck in the channels of distribution. In the case at Bar, the supposed restraint of trade is said to lie in the uniqueness of CBVT, the *distributor*. That calls for examination of market power, or potential bottleneck effects, at the distributor level, not at the manufacturer level.

Dictograph considered an entirely different situation. There were in that case many competitive suppliers of hearing aids, and they were held to have been disadvantaged by reason of defendant Dictograph's agreements with nu-

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[6] Petitioners pay lip service to the fact that *Dictograph* was a decision about market effect under the lower standard of Section 3 of the Clayton Act (Petition 18), but discuss the case as if it were in conflict with the court of appeals' decision here under Section 1 of the Sherman Act. The court in *Dictograph* emphasized (217 F.2d at 826-27) the legislative history of Section 3 of the Clayton Act and Congress's evident desire to avoid rule of reason analysis under the Sherman Act. Moreover, *Dictograph* involved exclusive dealing agreements which had numerous terms in addition to a requirement that the distributor take all of its requirements from Dictograph, including a noncompetition covenant by the distributor for a period after termination of the agreement, which the court emphasized. 217 F.2d at 823-24.

merous distributors. That is the opposite of the situation here. CBVT did not have numerous competitive suppliers to whom to turn when the Sicor, S.p.A. plant stayed shut down for over half a year. When CBVT made its agreement with Erbamont, it had lost the only supplier that had theretofore been available other than Erbamont. Whether or not Mercian would have materialized was problematic, to one degree or another. The references in *Dictograph* to the number of alternative suppliers highlights a controlling difference between it and this case.

Nor did *United States v. Dairymen, Inc.*, 660 F.2d 192 (6th Cir. 1981), another Clayton Section 3 case, establish any principles in conflict with the decision of the court of appeals below. Dairymen did not even say what petitioners claim for it. In *Dairymen*, the court considered the extent of immunity for price-setting by agricultural cooperatives under the Capper-Volstead Act, holding that there would be no immunity for an attempt to monopolize. The court's statement that the district court had set "too high a burden" on the Government, which the Petition quotes (Petition 18), was not made in conjunction with the court's quotation from *Tampa Electric*, as petitioners imply to this Court. Petitioners put both quotations in the same sentence in their petition to this Court and then cite the case "*Id.* at 194-95." (Petition 18-19.) That is an inaccurate citation. The court in *Dairymen* made the "too high" statement relative to the question whether specific intent in an attempt to monopolize case required a showing of predatory pricing. Four paragraphs later, in a footnote to a different analysis, the court in *Dairymen* quoted from *Tampa Electric*. It is those two, entirely disjointed statements, which petitioners join in their argument here. *Dairymen* has nothing to do with the analysis in the present case.

CONCLUSION

Respondents respectfully submit that the Petition be denied.

Respectfully submitted,

CHARLES B. COHLER
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for All Respondents

July 31, 1995
San Francisco, California

(3)

Supreme Court, U.S.
FILED
AUG 21 1995
CLERK

No. 95-8

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1995

SICOR LIMITED, ALCO CHEMICALS LTD.,

Petitioners,

v.

CETUS CORPORATION;
CETUS GENERIC CORPORATION;
BEN VENUE LABORATORIES, INC.;
BEN VENUE GENERIC CORPORATION;
and CETUS-BEN VENUE THERAPEUTICS,

Respondents.

On Petition for Writ of Certiorari
to the United States Court of Appeals
for the Ninth Circuit

REPLY BRIEF

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STATUTES

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ARGUMENTS RAISED IN RESPONDENTS' OPPOSITION BRIEF ARE ERRONEOUS AS A MATTER OF LAW AND FACT

The CBVT Respondents' Opposition Brief largely avoids the central question presented in the Petition for Writ of Certiorari. The gravamen of the issue is whether, as a matter of law, there can be no antitrust violation when a market's dominant supplier regains its monopoly by capturing the only distributor available to the monopolist's sole significant competitor. Despite uncontested evidence of high entry barriers, the court below held that excluding a monopolist supplier's chief competitor from the market is of no legal consequence so long as the number of downstream distributors in the market remains the same.

The practical effect of the court of appeals' ruling is to eliminate antitrust liability for monopolists who foreclose their rivals from the market through exclusive dealing or full requirement contracts. This holding, which permitted a company with a 60% share of the market to capture its competitor's 30% market share, represents a substantial revision of existing antitrust law.

The CBVT Respondents seek to avoid this fundamental issue by shifting the focus from their own anticompetitive acts to a challenge of the Sicor Petitioners' status as an aggrieved competitor. CBVT argues that its collusive agreement to re-establish a market monopoly has no anticompetitive consequences because Sicor's manufacturing facility was closed at the time CBVT made the exclusive dealing arrangement.

CBVT's argument misconstrues the record in this case and the rationale of the court of appeals' holding. As the record indicates, the indefinite shutdown *pendente lite* of Sicor's manufacturing facility did not prevent Sicor from continuing to supply CBVT with doxorubicin, either from its own prior inventory or by supplying doxorubicin produced at another FDA-approved facility. (App. 19a-23a).

Moreover, the fact that Sicor remained a competitive source of supply was irrelevant to the court of appeals, which premised its summary dismissal of Sicor's antitrust claims on the erroneous legal conclusion that the exclusive dealing contract "promoted" competition and was supported by "valid business reasons ... *i.e.*, ... to make money." (App. 12a-13a).

Thus, the assertion that Sicor was not a viable manufacturer is both incorrect and, more importantly, immaterial to the legal issues deserving of the Court's attention. The important federal question generated by the court of appeals' decision is whether a triable issue exists as to whether competition is harmed by a monopolist's elimination of its only competitive source of supply.

Sicor has not contended that a preclusion of this nature and extent is *per se* illegal. As this Court has emphasized, where an exclusive dealing arrangement results in a significant foreclosure of a market, a determination as to whether the contract violates the Sherman Act is to be made under a rule of reason analysis. The court of appeals' decision, however, denies Sicor the opportunity to make this showing. By holding that there can be no harm to competition because the number of distributors, rather than sources of supply, remains the same, the court of appeals, in essence, establishes a **reverse** rule of *per se* **legality**. This newly established precedent is what places the decision below at odds with this Court's prior holdings as well as the rulings in several other circuit courts.

ARGUMENT

The court of appeals' holding was based on the court's review, and affirmance, of the district court's summary adjudication of Sicor's antitrust claims. The court of appeals held, as a matter of law, that for purposes of summary judgment elimination of a monopolist's chief competitor did not constitute a restraint of trade or combination to monopolize.

In opposing this Petition, CBVT contends that Sicor was not a competitor but rather a middleman; that Sicor was unable to perform its supply agreement with CBVT because its manufacturing facility was closed; and that CBVT had no contractual obligation to purchase alternative supplies from Sicor. These contentions are incorrect, but more to the point they are not the grounds upon which the court of appeals based its opinion. The decision below held that, even viewed in a light most favorable to Sicor, "the appellants [Sicor] failed to allege and show that the conduct complained of unreasonably restrained trade." (App. 11a).

This decision established an erroneous and virtually unattainable summary judgment standard for challenging the type of exclusive dealing arrangements described here. It is on that basis that the court of appeals' decision should be reviewed by this Court. *United States v. Diebold, Inc.*, 369 U.S. 654, 655 (1962).

I. THE CLOSING *PENDENTE LITE* OF SICOR'S PLANT IS IMMATERIAL TO PETITIONERS' STATUS AS AN AGGRIEVED COMPETITOR

CBVT contends that the indeterminate shutdown of Sicor's manufacturing plant deprived Sicor of any standing to recover as an aggrieved competitor, and that the court of appeals so concurred. (CBVT's Opposition to Petition ("Opp. Brf.") at 9). To the contrary, the court of appeals' opinion recognized that Sicor was a competitor, but stated that its status as a competitive source of supply was "beside the point" under the court's so-called "pro-competitive" analysis at the distribution level.

> Sicor's allegation that no other finisher-distributor would have been readily available to contract with Sicor ... is arguably beside the point, for elimination of Sicor as a competitor would still leave the market essentially where it was before Sicor's entry, *viz.*, with two pro-

ducers and three finisher-distributors.

(App. 14a, n.9).[1]

Equally misleading and erroneous is CBVT's assertion that the court of appeals' analysis somehow turned on the question of whether Sicor was, as CBVT contends, a mere "middleman." (Opp. Brf. at 5). The court of appeals stated that it "need not reach the merits" of the contention that "Sicor, as a mere middleman, lacked standing to assert a claim under federal antitrust law." (App. 15a, n.10). Moreover, it noted, "the district court did not base its holding on this conclusion." (*Id.*) And, even if Sicor had functioned as a middleman, the court of appeals disputed CBVT's contention that Sicor would be precluded from asserting a claim for injury under the antitrust laws. (*Id.*)

Indeed, read in its entirety, the court of appeals' decision acknowledges what the uncontested record makes clear, namely, that Sicor was a direct competing source of supply in the relevant market. Sicor was without question an F.D.A. approved manufacturer of bulk doxorubicin, and Sicor sold this self-produced bulk doxorubicin to CBVT for finishing and resale in the United States. (App. 3a, 63a). This arrangement directly paralleled and competed with the once-monopolistic vertical arrangement between the dominant U.S. supplier Erbamont, its commonly-owned sister manufacturing company Farmitalia, and their wholly-

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[1]/ CBVT also contends that the use of the term "rival manufacturer" in Sicor's statement of Questions Presented "eliminates any possibility of petitioners recovering" because Sicor's parent company, Sicor S.p.A., and not Sicor, controlled the Sicor manufacturing facility. (Opp. Brf. at 4,9). As Rule 14.1(a) makes clear, however, "[t]he statement of any question presented will be deemed to comprise every subsidiary question fairly included therein." The record on appeal leaves no doubt that Erbamont and Sicor both competed as sources of supply in the relevant market through commonly held ownership interests in their respective affiliated manufacturing facilities.

owned U.S. distributor, Adria (App. 3a-6a, 63a).

Noting the direct competition between the two arrangements, the court of appeals stated that, when Sicor and Respondent CBVT entered the doxorubicin market in 1988, the Erbamont-Farmitalia Group "responded immediately to this challenge to their dominant position in the United States market." (App. 4a). When Erbamont's market share dropped from more than a 90% level to 60% as a result of Sicor-CBVT's intense price competition, the Erbamont-Farmitalia Group "did not ignore this competition." (App. 6a). Legal actions were taken by the Erbamont-Farmitalia Group in Italy, resulting in the issuance of a non-final injunction by the Italian authorities, interrupting *pendente lite* the production of doxorubicin at Sicor's Milan facility. (App. 6a).

It is this indefinite *pendente lite* closure of the Sicor facility which CBVT now argues precludes Sicor from challenging the dismissal of its antitrust claims. As with CBVT's other arguments, however, its contention that Sicor "had no competition to offer since the Italian authorities shut down Sicor, S.p.A.'s plant" must also fail as a matter of law and fact. As a factual matter, although the Italian injunction was in effect at the time CBVT abrogated its agreement with Sicor and contracted to purchase doxorubicin exclusively from the Erbamont-Farmitalia Group, Sicor still had additional inventory of self-produced doxorubicin available to sell CBVT. The court of appeals recognized as much, acknowledging that Respondent CBVT "declined" an offer of Sicor-produced doxorubicin after the plant's September 1990 shutdown, "explaining that its inventory of Sicor-produced bulk doxorubicin would last until the following summer." (App. 6a).[2]

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[2]/ The court of appeals addressed the issue of Sicor's "ability to compete" in the portion of its opinion which reversed the district court's dismissal of Sicor's state law claims. Commenting on the (continued...)

In fact, Sicor's status as a viable supplier remained unchanged after the plant closing, with Sicor offering CBVT a continuing supply of F.D.A. approved and chemically equivalent doxorubicin -- either of its own manufacture or from another F.D.A. approved producer such as Mercian. Thus, at the time when CBVT and the Erbamont-Farmitalia Group made their anticompetitive and price-stabilizing arrangement, CBVT could have continued to purchase doxorubicin from Sicor under the terms and conditions of the parties' existing agreements.

This leads to CBVT's third contention, that Sicor was obligated under its supply and distribution agreements with CBVT to supply only doxorubicin which Sicor itself had made. The court of appeals rejected this argument, finding nothing in the pertinent section or appendix of the parties' supply agreement which "limits [the] 'compound' to doxorubicin manufactured by Sicor." (App. 18a). To the contrary, the court of appeals emphasized that "[t]he record contains substantial evidence that CBVT acquiesced in or even agreed to Sicor's efforts to secure an alternate supplier." (App. 19a).

The court of appeals' conclusions on this issue further call into question the propriety of its holding on Sicor's antitrust claims. If, as Sicor contends, the supply and distribution agreements permitted it to supply doxorubicin from an alternate source, then CBVT's abrogation of the contracts and its entry into an all requirements contract with the Erbamont-Farmitalia Group cannot be construed as "pro competitive."

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[2](...continued)
district court finding that "plaintiffs can prove no damages ... because they have been incapable of competing in the U.S. bulk doxorubicin market since September of 1990," the court of appeals simply stated: "We find insufficient support in the record for this conclusion." (App. 23a).

Even if CBVT had established that the existing supply and distribution agreements did not permit Sicor to supply doxorubicin from an alternate producer, CBVT's exclusive dealing contract with the Erbamont-Farmitalia Group would still violate the antitrust laws. That is because CBVT had available to it, and rejected, a more competitive alternative than the exclusive dealing arrangement which restored the Erbamont-Farmitalia Group to its original market monopoly. Thus, even if CBVT were no longer obliged to purchase bulk doxorubicin from Sicor, it had the opportunity to do so. Not only did CBVT have that opportunity, but the price and other terms of an ongoing supply agreement with Sicor would have been identical to the parties' existing arrangement.

This Court has held repeatedly in the context of Clayton Act Section 7 cases that additional concentrations of market power by an already powerful seller may not be accomplished through acquisition of another significant seller if there is a more competitive alternative. *See Citizen Publishing Co. v. United States*, 394 U.S. 131 (1969); *see also, Diebold*, 369 U.S. 654 (1962).[3] The test of illegality under Section 7 of the Clayton Act is whether the concentration of market power through acquisition will "tend to create a monopoly." 15 U.S.C. § 18. In the instant case, the additional concentration of market power which occurred by virtue of the exclusive dealing contract not only tended to create a monopoly, it did so.

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[3]/ In *Citizen Publishing*, the concentration of market power through a joint marketing arrangement was held to violate **both** the Clayton Act § 7 and the Sherman Act § 2. The Court's rejection of a failing company doctrine defense to the joint marketing arrangement appears to have been intended to apply to both of the violations. In each case, the defense failed because there were other and more competitive alternatives to concentrating additional power in the already dominant company.

Since the harm of market concentration and foreclosure sought to be prevented by Section 7 of the Clayton Act is the same harm that is proscribed by Section 2 of the Sherman Act, it would seem fitting that an exclusive dealing/requirements contract be measured by the same criteria. If the anticompetitive evil consists of allowing a dominant company within a market to increase that dominance and control over prices by increasing its market share, then the same result is reached whether the increase is accomplished by merger or by an exclusive dealing contract.[4]

Nor can such an anticompetitive result be immunized from antitrust liability merely because the objective of the monopolist was "to make money." The court of appeals' acceptance of this new justification for market foreclosure, that of increasing profit, is contrary to this Court's principles for rule of reason analysis, and conflicts with holdings in other circuits. "[B]ecoming a monopoly simply to make more money is not a 'legitimate business justification' for 'monopolizing'." *Poster Exchange, Inc. v. National Screen Serv. Corp.*, 431 F.2d 334, 340 (5th Cir.), *cert. denied*, 401 U.S. 912 (1970).

II. THE DECISION SOUGHT TO BE REVIEWED CONSTITUTES A FINAL DETERMINATION OF PETITIONERS' ANTITRUST CLAIMS

The issues raised by this Petition arise out of the district court's Rule 54(b) dismissal of Sicor's antitrust claims, and the court of appeals' affirmance of that disposi-

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[4]/ There can be little doubt that if Erbamont and its distributor, with a 60% market share, had attempted to purchase the rival distributor CBVT, with a 30% share in a high entry barrier market, the acquisition would be declared unlawful under both the Clayton Act § 7 and Sherman Act § 2. Thus, there is good reason to apply the "more competitive alternative" test to the exclusive dealing contract at issue here.

tive ruling.[5]

In its Final Judgment of Dismissal, dated March 12, 1993, the district court "expressly" found that there was "no just reason for delay" and directed the entry of "a final judgment" as to Sicor's claims. (App. 57a). On April 3, 1995, the court of appeals entered judgment affirming the district court's final adjudication of Sicor's antitrust claims, reversing and remanding only that portion of the district court's opinion dealing with Sicor's wholly separate state law claims. (App. 1a, 30-31a).

Where, as here, a judgment conclusively disposes of claims which are distinct from the remainder of the litigation, such judgment is considered final for jurisdictional purposes. *See Sears, Roebuck and Co. v. Mackey*, 351 U.S. 427 (1956); *see also*, *Radio Station WOW, Inc. v. Johnson*, 326 U.S. 120, 127 (1945), holding that a review of federal law issues is appropriate where remaining claims "could not remotely give rise to a federal question".

In *Sears*, this Court found that plaintiff's antitrust claims -- *i.e.*, restraint of competition, wilful destruction of business, and monopolization under Sections 1 and 2 of the Sherman Act -- were "separate and independent" from plaintiff's pending common-law claims, which accused Sears of "unlawfully inducing a breach of [plaintiff's] commission contract" and "unlawfully destroying [plaintiff's] business by unfair competition and patent infringement." *Id.* at 430-31. Dismissal of the antitrust claims by the district court was held to constitute a "final decision" within the "meaning of Rule 54(b)." *Id.* at 436.

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[5]/ The court of appeals denied CBVT's motion for rehearing by the Panel and suggestion for rehearing *en banc* (*see* copy of July 10, 1995 Order, contained herein at App. 71a), and now has issued its Mandate (*see* copy of July 27, 1995 Notice, contained herein at App. 73a).

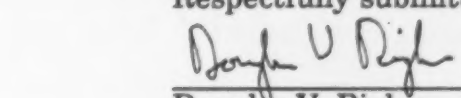
The same analysis, and result, are appropriate here. Sicor's antitrust claims are distinct from its state law claims, which focus on CBVT's obligations under a separate and independent contract, and on CBVT's tortious interference with Sicor's business relations with a third party. These state law claims do not rely on, or even refer to, the Sherman Act provisions that form the basis for the antitrust claims at issue here.

Similarly, CBVT lacks any basis for asserting that there is a "likelihood" that the questions presented by this Petition may become moot. The court of appeals' underlying rationale with respect to the antitrust issues is independent of the contract questions which were remanded for trial.

CONCLUSION

Final judgment, based upon the purported "pro-competitive" reasons enunciated by the court of appeals, has been entered. If this Court does not review that judgment, then it will remain the law in the Ninth Circuit that a monopolist supplier's deliberate preemption of its only effective competition is immune from challenge as long as the number of distributors in the relevant market remain the same. This inconsistent result would eviscerate the uniform application of this Court's rule of reason analysis with respect to exclusive-dealing contracts. Accordingly, the Petition for Writ of Certiorari should be granted.

Respectfully submitted,



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NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

SICOR LIMITED; ALCO CHEMICALS, LTD.	)	[FILED
	)	JUL 10 1995
	)	CATHY A.
Plaintiffs-Counter-Defendants-Appellants	)	CATTERSON, CLERK
	)	U.S. COURT
	)	OF APPEALS]
v.	)	
	)	No. 93-15667
CETUS CORPORATION; CETUS GENERIC CORPORATION; BEN VENUE LABORATORIES; BEN VENUE GENERIC CORPORATION; CETUS-BEN VENUE THERAPEUTICS; ERBAMONT N.V., ERBAMONT, INC.; FARMITALIA CARLO ERBA, S.R.L.	)	D.C. No. CV-91-01253-DLJ
	)	ORDER
Defendants-Counter-Claimants-Appellees.	)	

Before: CHOY, LEAVY and KLEINFELD, Circuit Judges.

The panel has voted to deny appellees' petition for rehearing and to reject the suggestion for rehearing en banc.

The full court has been advised of the suggestion for rehearing en banc and no active judge has requested a vote on whether to rehear the matter en banc. Fed. R. App. P. 35.

The petition for rehearing is denied and the suggestion for rehearing en banc is rejected.

OFFICE OF THE CLERK
UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

RICHARD W. WIEKING
CLERK

1301 CLAY STREET
SUITE 400S
OAKLAND, CA 94612-5212

July 27, 1995

CASE NUMBER: C91-01253-DLJ
CASE TITLE: Sicor Limited vs. Cetus Corporation
MANDATE FILED: 4/3/95

[FILED JUL 27 1995
RICHARD W. WIEKING
CLERK, U.S.
DISTRICT COURT
NORTHERN DISTRICT
OF CALIFORNIA
OAKLAND]

TO COUNSEL OF RECORD:

The mandate of the United States Court of Appeals for the Ninth Circuit has been filed in the above captioned case.

Sincerely,

RICHARD W. WIEKING, Clerk

/s/

by: Miriam Huichapan
Case Systems Administrator

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